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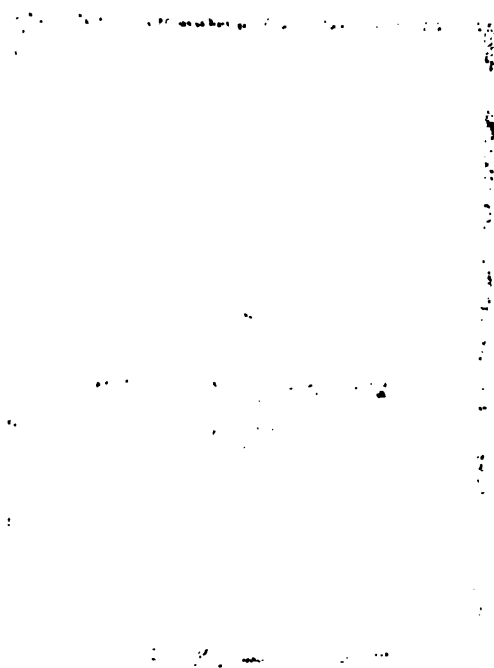


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41
REPORTS OF CASES

ARGUED AND DETERMINED

10

IN THE

SUPREME COURT

OF THE

DISTRICT OF COLUMBIA,

(GENERAL TERM,)

FROM THE

JANUARY TERM, 1877, TO THE SEPTEMBER TERM,
1879, INCLUSIVE.

BY

ARTHUR MACARTHUR,

ASSOCIATE JUSTICE.

W. H. & O. H. MORRISON,

LAW BOOK PUBLISHERS,

WASHINGTON, D. C.

1881.

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Rec. May 6, 1880

LIST OF OFFICERS
OF THE
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

JUSTICES.

DAVID K. CARTTER	- - -	CHIEF JUSTICE.
ANDREW WYLIE	- - -	} ASSOCIATE JUSTICES.
ARTHUR MacARTHUR	- - -	
ALEXANDER B. HAGNER	- - -	
WALTER S. COX	- - -	
CHARLES P. JAMES	- - -	

GEORGE B. CORKHILL	- - -	U. S. DISTRICT ATTORNEY.
R. ROSS PERRY	- - -	ASSISTANT U. S. DISTRICT ATTORNEY.

RETURN J. MEIGS	- - -	CLERK.
JAMES G. PAYNE	- - -	AUDITOR.

* U. S. MARSHAL.
* U. S. DEPUTY MARSHAL.

J. SAYLES BROWN	- - -	REGISTER IN BANKRUPTCY.
-----------------	-------	-------------------------

AMOS WEBSTER	- - -	REGISTER OF WILLS.
--------------	-------	--------------------

* The term of F. Douglass expired March 17, 1881, and the vacancy is not yet supplied.

MEMORANDA.

On the 13th day of January, 1879, Mr. Justice Olin resigned his seat on the Bench of this Court, upon which occasion the following communication was addressed to him by the members of the Bar :

WASHINGTON CITY, *January 25, 1879.*

Hon. ABRAM B. OLIN.

DEAR SIR: As members of the Bar of the Supreme Court of the District of Columbia, we cannot permit you to retire from that court without expressing our deep regret that the condition of your health makes it in your opinion your duty to do so, and our sense of the loss which the Bar and the court will sustain thereby.

During the long term that you have been a member of the court, your learning and ability, your almost intuitive perception of right, your enthusiastic love for justice, your broad and comprehensive understanding of legal and equitable principles, and your veneration for authority and precedent have done much to give stability to the judgments of the court, and have illustrated your eminent fitness for the position which you have occupied.

During the whole of your service upon the Bench our personal relations have been of the kindest character, and our respect for you as a judge has always been associated with the most sincere regard for you as a man.

It is our earnest and affectionate wish that your life, with health improved by cessation from the labors of office, may be prolonged, and that your mental powers, in all their vigor, may remain unclouded to the last.

We remain, with the highest respect, dear sir,

Sincerely your friends,

JAMES H. BRADLEY.	T. A. LAMBERT.
NATHANIEL WILSON.	R. D. MUSSEY.
WILLIAM F. MATTINGLY.	F. SCHMIDT.
L. G. HINE.	R. T. MERRICK.
FRANCIS MILLER.	JOHN J. JOHNSON.
A. G. RIDDLE.	JAMES S. EDWARDS.
R. K. ELLIOT.	JOB BARNARD.
JAMES G. PAYNE.	MILTON C. BARNARD.
I. HOLDSWORTH GORDON.	SIDNEY T. THOMAS.
R. ROSS PERRY.	WILLIAM JOHN MILLER.
HENRY R. ELLIOTT.	HENRY WISE GARNETT.
THOMAS WILSON.	W. EDMONSTON.
A. WEBSTER.	SAMUEL R. BOND.
W. D. DAVIDGE.	BELVA A. LOCKWOOD.
WALTER S. COX.	RANDALL HAGNER.
W. B. WEBB.	S. S. HENKLE.
ENOCH TOTTEN.	F. W. JONES.
JOHN F. ENNIS.	HUGH T. TAGGART.
JOHN E. NORRIS.	EUGENE CARUSI.
LINDEN KENT.	ANDREW B. DUVALL.
WOODBURY BLAIR.	JOHN W. ROSS.
JAMES M. JOHNSTON.	MILLS DEAN.
JOHN F. HANNA.	GEORGE F. APPLEBY.
A. C. BRADLEY.	REGINALD FENDALL.
JAMES H. SAVILLE.	NEAL T. MURRAY.

At a meeting of the Bench and Bar to take suitable action on the death of Mr. Justice Olin, which occurred July 7, 1879, and of Mr. Justice Humphreys, which took place within a week afterwards, the Hon. Andrew Wylie was appointed chairman, and Reginald Fendall, Esq., secretary.

W. D. Davidge, Esq., offered the following resolutions :

"Resolved, That this meeting deeply lament the deaths of Abram B. Olin and David C. Humphreys, late Justices of the Supreme Court of the District of Columbia, and will cherish an affectionate remembrance of their integrity, learning, and many virtues as judges and as men.

"Resolved, That the chairman and secretary of this meeting transmit a copy of these proceedings to the respective families of the deceased, and assure them of our sincere condolence in their bereavement.

"Resolved, That the chairman of the meeting be requested to present these proceedings to the court, with a request that they be entered on the minutes."

Eulogistic and very appropriate remarks were made by William B. Webb, District-Attorney H. H. Wells, and others, after which the resolutions were adopted and the meeting adjourned.

The Supreme Court of the District met in general term at noon. On the bench were Chief Justice Cartter and Justices Wylie, MacArthur, Hagner, Cox, and James, the full bench. After the opening of the court, Justice Wylie, leaving the bench, addressed the court, saying: "Since the adjournment in June last, two of our associates have been removed and gone to that other country of which we know so little. It is but right that we, their former associates, and the members of the Bar, should properly express our regret at their death. A meeting of the Bar was held this morning, suitable resolutions passed, and I have been directed to present them to the court." He then read the resolutions, and asked that they be entered upon the minutes of the court.

Chief Justice Cartter replied in appropriate terms of respect for the deceased, and directed the resolutions to be entered of record. The court then adjourned in token of respect for the occasion.

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The following cases, reported in the second volume, have been reversed in the Supreme Court of the United States. Cases affirmed are not referred to. No case in this volume has been reported as being reversed down to the present time.

Peugh v. Davis, 6 Otto, 332.

Phelps v. McDonald, 9 Otto, 298.

REPORT OF CASES
DECIDED BY THE
Supreme Court of the District of Columbia,
FROM
APRIL TERM, 1877, TO SEPTEMBER TERM, 1879.

THOMAS N. NAUDAIN v. JAMES M. ORMES AND J. STANLEY JONES.

EQUITY.—No. 9765.

When a judgment creditor is indebted to the complainant upon certain promissory notes, and the complainant asks that such judgments may be set off against the amount due him upon such notes, it is necessary to allege in the bill of complaint filed for that purpose that such judgment creditor is insolvent, or to aver some other fact or circumstance which prevents the complainant from having an adequate remedy at law for the recovery of the amount due on his notes.

STATEMENT OF THE CASE.

Demurrer to bill of complaint. The facts stated in the bill are substantially as follows:

The plaintiff was the owner and holder of two promissory notes, dated August 26, 1872, made by the defendant Ormes, payable to the order of and endorsed by the other defendant, Jones. They were transferred, before maturity, to the plaintiff, and demand of payment and notice of dishonor were waived by the defendant Jones, the endorser. The notes were secured by trust deeds on real estate in the city of Washington. The notes not being met at maturity, the property was advertised and sold under the powers contained in the deeds of trust, and the proceeds were not sufficient, by the sum of \$1,836.57, to pay the notes. The property was bought at the sale by the plaintiff, who now owns it.

Naudain v. Ormes and Jones.

That one Mary E. Godey, the executrix of the last will of William H. Godey, about the 26th day of September, 1873, recorded a judgment against the defendant Ormes in the sum of \$342.18, and afterwards duly sold and assigned the same to Jones, which assignment was entered of record. That the said judgment was recovered prior to the recording of said deeds, and thereupon became a lien upon said property.

That Jones is the owner of said judgment, and refuses to permit the said judgment to be credited upon the amount due from him to plaintiff upon the notes, and threatens to issue a writ of execution to be levied upon said property, and complainant fears that if he should institute proceedings upon said notes, Jones would sell and transfer his interest in said judgment to defeat the application of the amount of said judgment as a credit upon the amount due from Jones upon said notes. The complainant is willing that the amount of said judgment, interest and costs, may be credited upon the amount due him from Jones.

The complainant prays a judgment for the amount due him upon the notes; that Jones be restrained from assigning or selling said judgment, and that the amount of said judgment may be credited upon the notes.

The defendant Jones interposed a demurrer to the bill of complaint, and for cause showed as follows:

That the plaintiff is not entitled upon said bill to the relief prayed for, because he had adequate remedy at law, and because he hath not, by said bill, made or stated such a case as entitles him in a court of equity to any discovery, or to any relief against him, as to the matters and things in said bill contained.

The special term allowed the demurrer and entered a decree dismissing the bill as to Jones. From this decree the plaintiff appealed.

Enoch Totten, for complainant, submitted the following points and authorities:

1st. If the bill were considered deficient in that it does not

Naudain v. Ormes and Jones.

allege the insolvency of Ormes and Jones, an opportunity should be given to correct such deficiency by amendment. The records of this court clearly show such insolvency.

2d. The Godey judgment is perfectly good, and undoubtedly forms a prior lien upon the property. It would be inequitable to permit Jones to collect or sell this judgment, and thus avoid the application thereof to the debt due from him to plaintiff. Our statute permits the law court to set off "mutual debts, * * * whether the said debts be of the same or a different nature." (Rev. Stats. Dist. Col., 96.) Equity usually follows the law in regard to set-off; but where the equities of the case justify it, equity courts will go beyond the law in order to do justice between the parties. (2 Story Eq. Jur., sec. 1436; *Williams v. Davies*, 2 Simons R., 461; *Simpson v. Hart*, 1 John. Ch., 80; S. C., 14 John., 63.)

James S. Edwards, for defendant Jones.

Equity will not restrain proceedings under a judgment on the ground of a set-off in respect to distinct and unconnected debts, in the absence of any other circumstances calling for the aid of a court. (*Dade v. Erwin's Ex'rs*, 2 How., 383.)

The mere existence of cross-demands is not of itself sufficient to constitute an equitable set-off, or to warrant an injunction; and a court of equity will not, on the ground of an open and unsettled account between the parties, restrain a judgment creditor from profiting by his judgment. (*Rawson v. Samuel*, 1 Cr. & Ph., 161.)

A set-off or counter-demand, acquired after verdict, though greater than the amount of the verdict, will not authorize an injunction against the proceedings, since it would be manifestly unjust that the plaintiff should be delayed or hindered in obtaining the benefit of his verdict by interposing a claim not yet established by law. (*White v. O'Brien*, 1 Sim. & Stu., 551. See, also, *High on Injunctions*, p. 85, and others.)

By the COURT:

There is no allegation in the bill that the defendants are insolvent, or that Jones is not in a condition to pay the balance

Manufacturing Company v. Taylor.

due the complainant upon the notes; neither is there any averment, such as fraud or mistake, which would confer equity jurisdiction or prevent the complainant from collecting the balance due upon his note by an action at law. For aught that appears upon the face of the bill, the remedy at law is full and adequate. The decree below was, therefore, right. It has, however, been suggested at the bar that the notes are now outlawed and the defendants insolvent, and an opportunity is asked to amend the bill of complaint so as to set forth the circumstances necessary to supply the want of equity in its allegations. The order of the court will be to affirm the judgment, but to remand the cause to the special term, with leave to the complainant to amend his bill in the respect just mentioned.

POTTIER & STYMUS MANUFACTURING COMPANY v.
JONATHAN TAYLOR.

AT LAW.—No. 15,141.

The District of Columbia is not liable to be garnished for debts due its contractors, and the Commissioners are exempt from such process on the grounds of public policy.

STATEMENT OF THE CASE AND DECISION.

Motion to quash a writ of process served on the Commissioners of the District of Columbia. The action is on a judgment in favor of the plaintiff in the Supreme Court of New York, and the attachment was issued for the purpose of subjecting to the payment of plaintiffs' claims certain moneys due the defendant, Taylor, by the District of Columbia, for work done on the public streets under contract made by him with said Commissioners. It is admitted that there is a balance due Taylor for such work, and that the garnishees are accounting officers of the District, and that they held such

Schoyer v. Commissioners Freedman's Savings Bank.

balance in their official character as municipal officers. The question presented is whether the sum thus due the defendant, Taylor, is liable to attachment by his creditors in the hands of the District Commissioners. The chief justice in the Circuit Court made an order quashing said writ of attachment, from which the plaintiffs appealed. The general term affirmed the decision of the court below, holding that the District was not liable to be garnished for debts due to its contractors, and that the Commissioners are exempt from such process on the grounds of public policy. (*Derr & Thompson v. Timothy Lubey et al.*, 1 McA., 187.)

Glen W. Cooper and H. D. Beam, for plaintiffs.

Shellabarger & Wilson, for defendant Taylor.

GEORGE W. SCHOYER v. JOHN J. CRESWELL, ROBERT PURVIS, AND ROBERT H. P. LEIPOLD, COMMISSIONERS OF THE FREEDMAN'S SAVINGS AND TRUST COMPANY.

AT LAW.—No. 14,959.

It is no cause of action against the commissioners of the Freedman's Savings and Trust Company, that a depositor gave sixty days' notice, according to the rules of the company, that he intended to check or draw out the amount of his deposit, and that the sixty days expired before the suspension took place, or the commissioners took possession of the assets.

STATEMENT OF THE CASE AND DECISION.

Demurrer to a replication. The declaration contains the common counts, and the bill of particulars shows a demand for the sum of \$527.28.

The plea in bar sets up that the defendants were appointed to settle the business affairs of the Freedman's Savings and Trust Company, under and by virtue of an act of Congress approved June 20, 1874; that said corporation is insol-

Fitzgerald v. Leisman.

ent, and closed its doors and ceased to pay its creditors on the 29th day of June, 1874, and that the defendants, since the 11th day of July thereafter, have been engaged in discharging their duties as commissioners; that they have declared one dividend of 20 per cent., and that plaintiff has received that dividend upon the amount of his claim before the commencement of this action. Replication that plaintiff had deposited with the Freedman's Savings and Trust Company the sum of \$652.21, subject to his order, and on the 29th day of April, 1874, in pursuance of the rules of said company, he gave sixty days' notice to the officers thereof that he intended to draw or check out the entire amount, and at the end of said sixty days, which occurred before the suspension of the company, and before the defendants qualified and took possession of its effects, he demanded payment. To this the defendants demurred, on the ground that it is immaterial whether or not a notice was given to the Freedman's Savings and Trust Company before suspension, as the defendants could not pay out the funds in their hands except as the statute directs. These causes of demurrer were sustained by the court below, and the general term are of the same opinion. The judgment is therefore affirmed.

Moore & Newman, for plaintiff.

Enoch Totten, for defendants.

STEPHEN FITZGERALD v. JULIA LEISMAN.

AT LAW.—No. 14,715.

An appeal will not lie from a judgment in a Justice's Court founded upon a verdict of a jury.

The case is stated in the opinion of the court.

H. B. Moulton, for plaintiff.

M. Thompson, for defendant.

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Mr. Justice MACARTHUR delivered the opinion of the court :

Motion to quash writ of certiorari. The action was commenced before a justice of the peace. Both parties appeared and the plaintiff demanded a trial by jury, who returned a verdict for \$50 in favor of the plaintiff, upon which there was judgment. The defendant prayed an appeal to this court, which was refused by the justice on the ground that an appeal would not lie from a judgment in a Justice's Court founded upon the verdict of a jury.

The defendant then applied for a writ of certiorari, and upon the facts above set forth this motion to quash was made by the plaintiff before the judge holding the Circuit Court, who has certified it to the general term to be heard in the first instance. The question now to be determined is whether the justice was right in refusing the appeal demanded by the defendant, or, in other words, whether an appeal lies to a judgment of a justice of the peace upon the verdict of a jury. We are all of opinion that there is no right of appeal in such case.

In the first place we cannot examine the facts of the case upon certiorari, because this court cannot know the facts which were found by the jury. There is no special finding, and the petitioner has not disclosed them, nor, indeed, is it in his power to state any matter of fact upon which the verdict is founded, and which would show it to be erroneous; and there is no record of the evidence of which this court can take judicial cognizance. There is, therefore, no ground upon which this writ can be sustained, and for this reason alone it ought to be quashed.

The late Circuit Court of this District had occasion to construe the act of Congress approved March 1, 1823, in regard to the jurisdiction of justices of the peace in the District of Columbia, and they uniformly decided that no appeal would lie from a judgment in a Justice's Court, upon the verdict of a jury, to retry the case upon its merits. They held that in such a case the justice acted ministerially in entering judgment upon the verdict; that the jury was a substitute for the

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magistrate, and decided both law and fact; that consequently there was neither certiorari nor a bill of exceptions, for the reason that there was no act of the justice to revise or review. The seventh amendment to the Constitution, which declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law," is a prohibition to the courts of the United States to retry a case by a jury in any other manner than according to the method pointed out by the common law, and we all know that the only mode known to the common law of retrying an issue already passed upon by a jury was by the granting of a new trial. A case that has once been submitted to a jury, and a verdict obtained, cannot be submitted to another jury in any other way at common law. The justice of the peace is not authorized to grant a motion for a new trial, nor can any exceptions be taken to his rulings or instructions to the jury, for he is not permitted to pass either upon questions of fact or law. The parties to a case brought here by an appeal from a judgment of a justice of the peace, can demand a jury trial, for the reason the trial in the court below was by the justice alone. It would, therefore, contravene the amendment of the Constitution just referred to should we try this case upon an appeal.

We would further suggest that the Revised Statutes embody the provisions of the act of March 1, 1823, in respect to all matters of appeal, and the decisions of the late Circuit Court are as applicable to existing provisions as to those formerly in force. We refer to *Smith v. Chase*, 2 Cranch C. C., 348; *Davidson v. Burr*, 2 Cranch C. C., 515; and the cases cited in the marginal note to the seven hundred and seventy-fourth section of the Revised Statutes, p. 92.

For a general discussion of the constitutional question growing out of the seventh amendment, see *Parsons v. Bedford*, 3 Peters, 444, 445.

The motion to quash is granted.

Parson v. Parker.

MARY A. PARSON ET AL. v. GEORGE AND ANN S.
PARKER.

EQUITY.—No. 3730.

- I. An order overruling or sustaining a demurrer, with leave to amend or answer over, is not appealable.
- II. An order sustaining a demurrer to a bill of complaint in equity, or to a declaration at law, does not involve the merits of the case where leave is given to amend such bill or declaration within a specified time. If the plaintiff elects not to amend, and there is judgment against him, he may then appeal to the general term.
- III. After final judgment, if an appeal be taken, all orders made in the progress of the suit affecting the merits are subject to review by this court.

The case is stated in the opinion of the court.

John D. McPherson, for complainants.

Gordon & Gordon, for defendants.

Mr. Justice OLIN delivered the opinion of the court:

The question arising in this case, and in several other cases brought before us at this term, is whether an order overruling or sustaining a demurrer, with leave to amend or answer over, is an appealable order. The solution of this question depends upon the meaning and true interpretation of section 772, Revised Statutes of this District, page 92. The section provides that—

“Any party aggrieved by any order, judgment, or decree made or pronounced at any special term, may, if *the same involves the merits of the action or proceeding*, appeal thereupon to the general term of the Supreme Court; and upon such appeal the general term shall review such order, judgment, or decree, and affirm, reverse, or modify the same, as shall be just.”

By an order, judgment, or decree involving the merits of a case, we understand an order, judgment, or decree which puts an end to the suit or controversy while unreversed or not

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set aside. An order sustaining a demurrer to a bill of complaint in equity, or to a declaration at law, does not involve the merits of a case where leave is given to amend such bill or declaration within a specified time. If the complainant or plaintiff elects not to amend within the time limited, and judgment is entered against him, he may then appeal to the court in general term, and this court will then determine whether the demurrer was a response to the action. So, on the other hand, if the defendant interposes a plea to a bill in equity, or a plea to a declaration at law, and the complainant or plaintiff demurs to such plea, and the demurrer is adjudged to be well taken, but leave is given to amend by pleading to the merits, such order does not involve the merits. If the defendant elects not to amend by pleading, within the time limited, to the merits, and final judgment is taken against him, he then may appeal to the court in banc, which will determine whether the demurrer was properly sustained or overruled. There is no hardship in this rule. That, we think, is the true meaning of section 772; for it provides that in an appeal to this court from any other judgment or decree involving the merits of a case, this court shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just. It was strenuously argued in this case that the meaning of the section I have before quoted is that any order, judgment, or decree affecting the merits of a case made at a special term was appealable to the court in banc. The difference between an order *affecting the merits* of a case and an order, &c., involving, &c., merits of a case, is scarcely worth discussion. By the *merits of a case* I suppose is included the averments of such facts as will constitute a ground of relief at law or in equity. If the bill or declaration does not contain by averment all those essential merits, it is demurrable. An order, judgment, or decree involving the merits of a case is therefore such, and such only, as, if not set aside or reversed, will put an end to the suit or controversy. To hold the contrary would render every order made either at law or in equity appealable. It is difficult to

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conceive that any order made in the course of judicial proceeding may not, to some extent, in a greater or less degree, affect the merits of the case. For instance, an order extending the time to plead, or an order refusing to extend such time, or an order requiring the party to furnish a further and more specific bill of particulars, and many other orders which might be enumerated, may affect the case; but as such orders do not involve the merits of the case, they are not appealable. After final judgment in a case, if an appeal be taken, all orders made in the progress of the case affecting the merits of the suit are subject to review by this court.

THE WASHINGTON AND GEORGETOWN RAILROAD CO.
v. THE DISTRICT OF COLUMBIA.

AT LAW.—No. 14,510.

The Board of Public Works had no authority to enter into a contract for paving a sidewalk on one of the streets around the Capitol, which was provided for in sundry civil appropriation act of March 3, 1873, 17 Stats. at Large.

STATEMENT OF THE CASE AND DECISION.

Demurrer to declaration.

The facts alleged in the declaration are substantially these: On the 7th of November, 1873, the Board of Public Works issued a notice to the effect, that owners of property might receive permission to lay improvements in front of their property so far as inside walks, parking, and curbing were concerned, according to certain regulations that were prescribed in said notice. When the work was performed, certificates were to be issued for the amount due the person performing the work; which certificates were to be deducted from the assessment for street improvements on private property. Afterwards, on the 7th day of March, 1874, written orders were made by the board permitting the plaintiff

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to do the necessary parking on the north side of B street north, from First street west to New Jersey avenue, and also to grade and pave the footways along the same part of B street. Thereupon the plaintiff, about the 1st day of April, 1874, performed the labor and furnished the materials necessary, and graded and paved the footway of, and parked, the said portion of B street in a good, workmanlike manner. The work and materials were approved by the engineer of the board, and was thereby accepted by the District of Columbia, and has ever since been used as a public thoroughfare, and the labor and materials were reasonably worth the sum of \$2,269.95, one-third of which sum was, according to law, assessable against the plaintiff, as the owner of the adjoining property, leaving a balance due the plaintiff from the defendant of \$1,513.30.

The defendant demurred, on the ground that the action alleged to have been taken by the Board of Public Works did not constitute a valid contract binding upon the District. The following matters of public law are here referred to as included in the issue. The thirty-seventh section of the act of Congress of February 21, 1871, requires that all contracts made by the board shall be in writing and signed by the parties making the same, and that the board shall have no power to make contracts to bind the District to the payment of any sums of money except in pursuance to appropriations made by law, and not until such appropriation shall have been made. The act of Congress of May 8, 1872, (17 Statutes at Large, section 6,) enlarged the public grounds around the Capitol by extension between First street east and First street west northwardly to the south side of North B street and southwardly to the north side of South B street.

The sundry civil appropriation act of 3d March, 1873, (17 Statutes at Large, 519,) appropriated "for grading and paving the streets and footways around the Capitol, and running from Pennsylvania avenue to B streets north and south, to the line of the east front of the Capitol, and for improving the grounds within that area, one hundred and twenty-five

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thousand dollars: *Provided*, That in the improvements of streets about the Capitol the Secretary of the Interior shall assess and collect the cost of all improvements made in front of all private property in the same proportion as charged by the District authorities for similar improvements."

The above act by its terms covers the streets and footways around the Capitol grounds, and, it is contended by the defendant, includes the streets and sidewalks where the parking and paving was performed by the plaintiff.

The cause upon demurrer was certified to be heard at the general term in the first instance. The court sustained the demurrer, holding that the law above cited provided that the streets where the plaintiff sues for laying a sidewalk and parking were to be improved by the United States, and that the Board of Public Works had no authority for charging any portion of the expense to the District of Columbia, or to assess any portion of it on private property; that this power is placed in express terms by the act in the Secretary of the Interior, and not in the Board of Public Works.

Demurrer sustained.

Enoch Totten, for plaintiff.

E. L. Stanton, attorney for District of Columbia.

An amended declaration was afterwards filed in this cause by permission of the court, and it appearing thereby that B street was not within the public grounds surrounding the Capitol, the plaintiff's right to recover was sustained.

McCloskey's application for patent.

IN THE MATTER OF JOHN McCLOSKEY'S APPLICATION
FOR A PATENT ON BELT GEARING, FILED AUGUST
20, 1876.

- I. A patent will not be granted by the Commissioner of Patents for an invention which has been previously described in an English patent, nor will it be granted where, from the state of the art, no further description than that contained in the English patent is necessary in order to enable a mechanic to construct and operate the alleged improvement. This is especially the case where the claim is for a combination, and not for the process by which it is produced.
- II. When an English patent describes an improvement, and also an alternate mode of effecting the object, it will be a good ground for refusing a patent in this country to another person for either of the modes so described.
- III. When a production or combination is claimed, it is not necessary to describe the process by which it is made. That may properly be left to the skill and judgment of persons acquainted with the art.

The case is stated in the opinion of the court.

James A. Whitney, for applicant.

Extracts from briefs of counsel:

More than this, these several officials (of Patent Office) lay great stress upon the assumed state of the art. Now, as a matter of fact, there is no state of the art as relates to the manufacture of metallic driving belts; for metallic driving belts were not known in any art before McCloskey's mention of them. These gentlemen refer to the well-known chain and sprocket wheel; but the chain used in connection with a sprocket wheel is made up of forged or cast metallic links connected by transverse pivots, and these links, catching over the radial spurs of a sprocket wheel, receive and transmit motion therefrom; but the manufacture of chains and sprocket wheels is totally distinct from the handicraft called into play in the production of applicant's invention. The chain and the sprocket wheel are the product of the founder and the blacksmith, in conjunction with mechanical ability sufficient to bore straight holes with a drill and insert straight pivots.

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McCloskey's invention relates to the use of tempered sheet metal, cut into a strip, punched with holes, fastened together at its ends, and provided upon the periphery of a pulley furnished with radial spurs in such manner that, while the perforated endless strip of sheet metal hugs the surface of the pulley like a common belt, its holes receive the radial spurs of the pulley in order to combine an absolutely positive transmission of motion with the smooth running and avoidance of friction incident to the hugging of the belt upon the pulley. Here is a result different from that obtained by the chain and sprocket wheel; and a result obtained by a means quite different from those obtained by the chain and sprocket wheel; and a result obtained by means not indicated in Winter's patent, (the reference cited,) for the simple reason that the means indicated in Winter's patent aforesaid is not an apparatus the same as McCloskey's, but a device quite different in its proposed construction, and one so opposed to all the principles of mechanics that it cannot be made, and, even if made, it cannot be used, and which, as a result, never has been made, and never will be. (Citing *Jones v. Sewall*, 6 Fisher, 343; *Poppenhusen v. N. Y. Gutta Percha Comb Co.*, 2 Fisher, 62, 83, 461; *Woodman v. Stimpson*, 3 Fisher, 98, 343; *National Filtering Oil Co. v. Arctic Oil Co.*, 4 Fisher, 514, 532, 584; *Waterbury Brass Co. v. Miller*, 5 Fisher, 48, and 6 *Id.*, 115.)

J. B. Church, for Commissioner of Patents.

Both McCloskey's and Winter's specification must be considered as addressed to mechanics acquainted with the art to which the inventions belong. They each describe the combination of flexible metallic belts, having equidistant perforations with pulleys, having projections to fit said perforations, and because one has failed to point out any machinery for producing such belts, whereas the other has referred to one class of machines, he cannot be said to have given less to the public, simply because one of such machines may not be adapted for the purpose.

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Even admitting that the machine described would not operate, which is denied, still it cannot be maintained that the invention claimed was not fully described, and as capable of being used at that time as at present, even with the aid of applicant's specification, which conveys no information whatever upon the subject.

If, without any further instruction than that derived from Winter's specification, a mechanic could make and use the invention claimed by applicant, he gave all the information that was necessary, and this although he may in the patent suggest the use of an inoperative machine; for it was not necessary that the machine be employed in order to work the invention.

It is a well-settled rule that every description of an invention, whether contained in a patent or printed publication, is to be construed in view of the state of the art at the time of its issue. (*Railroad Co. v. Dubois*, 1 Wall., 47; *Mann v. Bayliss*, 10 O. G., 789; *Estabrook v. Dunbar*, 10 O. G., 909.)

That it required no invention to make the belt with perforations after the combination claimed had once been suggested, is evident upon a consideration of the then state of the art.

Metallic belts were old and well known, as shown by the following patents: An English provisional specification filed by E. T. Hughes, No. 1357, dated May 30, 1863, for metallic belts for pulleys, in which is described the use of a metallic band, preferably of steel, in connection with pulleys, this band to be used as a substitute for the ordinary leather, rubber, or woven belts.

A like description filed by F. L. and C. L. Hancock, No. 583, and dated February 24, 1866, in which the invention is said to consist "in the manufacture of driving belts or bands of endless strips or bands of steel, iron, brass, copper, or other metal or metallic alloy, possessing sufficient strength and flexibility," these strips to be used singly, two riveted together, or in combination with leather.

Letters-patent have also been granted in this country for

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similar combinations of steel with leather or rubber belts. See patents to T. Standring, September 1, 1868, No. 81,823; V. Fountain, Jr., December 17, 1867, No. 72,181; and L. Stern, August 3, 1869, No. 93,364, copies of which, duly certified, are here presented.

It thus appears that steel bands have been long known, and the requisite material and qualities specifically pointed out. Moreover, there was no room for speculation or experiment as to the co-operation of a flexible belt and a sprocket wheel or pulley, with projections; for that, too, was old in the art. See patent to John Boynton for carding engine for wool, &c., July 12, 1843, antedated January 12, 1843, No. 3,174. When, therefore, Winter suggested a perforated metallic belt, all it was necessary to do was to punch holes at regular intervals through any one of the belts described, and apply it to pulleys having spurs or projections on their periphery to fit into such perforations, thus fulfilling the conditions as to sufficiency of a reference as laid down in *Seymour v. Osborne*, 11 Wall., 516, that "the knowledge supposed to be derived from the publications must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use."

In conclusion, it may be stated that the applicant has failed to show that the invention described by Winter in his patent is inoperative; that the presumption is in favor of its practicability, and that, describing the invention claimed, it is immaterial whether or not the patent describes an inoperative machine or none at all, provided the combination as stated could be made and used, which, in this case, is apparent, in view of the state of the art, the means of manufacturing being auxiliary to the real invention.

And further, McCloskey cannot be heard to deny that the combination described by Winter is capable of being made and used by those skilled in the art, inasmuch as he himself has failed to describe any means whatever for the purpose, and to deny that Winter's combination is operative is to condemn his own alleged invention.

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Mr. Justice MACARTHUR delivered the opinion of the court:

This is an appeal from a decision of the Commissioner of Patents refusing an application for a patent on belt gearing, filed August 20, 1876. Applicant's claim is as follows:

"The endless flexible metallic belt A, formed with a system of holes, *a*, in combination with pulley constructed with a series of radial spurs arranged to play into the holes, *a*, of the metallic belt, substantially as herein described, for the purpose specified."

The alleged invention, it will be seen, consists in combination of a perforated metallic belt or band, with a pulley having radial spurs or projections on the periphery, which, during the rotation of the pulley, enter the perforations, and so give a positive and non-slipping action to the belt. In other words, the specifications describe a metallic belt, perforated at equal intervals, and combined with a pulley having teeth which fit into the perforations in the rotary motion of the pulley. The advantages claimed for this arrangement are, that it differs from the ordinary belt in the steady hold by which the pulley keeps it in place; that it also differs from cog gearing in the absence of noise and reaction of the wheels upon each other; and that it also differs from chain gearing in the fact that a very large proportion of the power transmitted by the belt is due to its frictional or hugging contact on the broad periphery of the pulley. The combination is, therefore, recommended by marked indications of utility, and would be entitled to a patent unless it has been anticipated by previous discoveries.

The Commissioner rejected the application on an appeal made to him from a decision against a patent by the examiners-in-chief, and afterwards denied a motion for a rehearing, based on the ground that newly-discovered evidence might be considered. The claim was rejected, for the reason that it was substantially anticipated by an English patent, dated August 30, 1869, No. 2,586, for improved metallic driving belts. The description of this invention, taken from a copy of the English patent, is as follows:

"This improved metallic driving belt consists of a wire or

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rod of iron, copper, or other suitable metal, flattened at intervals of equal distances apart, sufficient to be elastic when annealed, portions of the said wire being left prominent, forming teeth or projections thereon to fit into teeth or notches formed in the surface of the pulleys to be used in connection therewith, for driving or communicating motion to different kinds of machinery. Or instead of projections being formed thereon, perforations may be made in flattened wire to fit projections formed on the pulleys to be used therewith.

"In the manufacture of such belts or bands, I use a pair of hardened steel rollers, the surface of one or both being formed suitably to leave the projection or to produce the perforations, as may be required."

He then proceeds to describe, by reference to drawings, a pair of rollers for forming the projections on the wire, but makes no further reference to those for making the flattened and perforated belt.

It was considered by the Commissioner that, in view of the state of the art, no further description than is contained in the English patent is necessary to enable any mechanic acquainted with such devices to construct and operate McCloskey's improvement, and that, therefore, no invention had been made by the applicant. The case comes here on appeal from that decision, the reasons of appealing being that the Commissioner erred in respect of the grounds upon which he refused the patent. In order that the merits of this application may be properly considered, it is, therefore, necessary to determine in what respect the alleged invention is original. If the description in the British patent, taken in connection with what was then known in regard to the state of the art, would suggest the proposed combination to a person of mechanical skill and judgment, the decision of the Commissioner must be affirmed for the reasons stated by that officer in rejecting the claim. The idea of employing driving belts of steel, iron, brass, copper, or other metal possessing strength and flexibility for the transmission of motive power, is not new. They had been used on pulleys for several years, and

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were patented in England as early as the year 1868. In this country letters-patent, dated December, 1867, were granted for an improvement in machine belting by combining leather with metal riveted thereto. In September, 1868, a patent was granted for improved belting, which consisted of a thin layer of steel or other suitable metal, cemented between two layers of leather or other suitable material, so that said metallic layer may be securely fastened by the edge of the strips being sewed together. And in August, 1869, still another patent was issued for a driving belt made of India rubber and metal strips united together during the process of vulcanization. Any claim made in 1876 for the discovery of metal belting for machinery would not be sufficiently original to justify a patent, nor would the application of such belts, to be used in combination with pulleys, change the result, for that mode of application is illustrated in the several improvements already referred to. Consequently, it is not easily understood how the applicant's counsel can argue, as a matter of fact, that there was no state of the art as relates to the manufacture of metallic driving belts, and to declare that metallic driving belts were not known in any art before McCloskey's mention of them. In one of the figures accompanying the drawing to his specification a belt is represented composed of two concentric thicknesses of sheet metal, with a layer of India rubber or other flexible material between, the whole united by rivets; and figure four represents still another belt in two coils of sheet metal strips turned up on itself and riveted. If it is the intention to claim that belts of metal united with other materials were unknown prior to this description, we have only to consider the instances of this kind where, as before mentioned, the same thing is described in previous patents to render this misapprehension quite evident. We have not only descriptions of belts of steel with leather or India rubber, but also of belts exclusively metallic to be used as a substitute for those of leather or other materials. These devices were certainly old when McCloskey applied for a patent in this case, and any claim to originality on that score must be rejected.

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The applicant, however, claims invention in another point of view; for he says his belt is original in having a system of holes, into which the radial spurs enter as the pulley revolves. It is to be observed that McCloskey's specification describes no process of making the improvement, and claims none. The combination is all for which the patent is asked, and no account is made of any operation by which the belt is perforated or the teeth on the pulley projected. It is, perhaps, proper, however, to suggest that the process of punching metal while being rolled was well known long before the present application, and at least two patents for improvements in that art were introduced at the hearing.

The expedient of a metallic driving belt with perforations to fit projections formed on the pulley to be used therewith, is also distinctly stated in the English patent to William Winter in 1869, of which mention has already been made. After stating that his driving belt consists of a wire or *rod of iron, copper, or other suitable metal flattened at intervals, * * ** portions of the said wire being left prominent, forming teeth or projections thereon to fit into teeth or notches formed on the surface of the pulleys, Winter concludes his description in these words: "Or instead of perforations being formed thereon [on the wire], perforations may be made in the *flattened wire to fit projections formed on the pulleys* to be used herewith."

The plan of McCloskey is a metallic belt with holes, in combination with a pulley having projections, or, as he calls them, "spurs," to play into the holes of the belt. In other words, they both describe a metallic belt punched with holes, and a pulley to be used therewith, having projections upon its circumference which pass into the perforations of the belt, and being placed relatively to each other as the pulley is caused to turn by the motive power thus employed. The operation is the same in both cases, and the object attained is a mechanical advantage secured by a process of the same principle. It is true that the particular mode proposed in the first part of Winter's specification employs projections upon

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the belt to fit into notches on the surface of the pulley, and in this form may not seem to anticipate the claim of McCloskey. It does not follow, however, that the other method he suggests of reversing that arrangement by perforating the belt and transferring the corresponding projections to its pulley is less eligible or less direct in its bearing upon the case now before us. Winter's specification embraces both modes, and the selection is left to the choice of those who may have occasion to use them. It will not be denied that when a patentee describes an alternate mode of effecting the object, it will be a good ground for refusing a subsequent patent for either of them to another person. The alternative mode set forth in the Winter patent involves a belt of wire or other suitable metal flattened, with perforations made therein to fit projections formed on the pulley. The resemblance of this to McCloskey's claim is evident, both in form and principle, as well as in regard to the materials employed, the only difference being in the verbal terms in which the respective claims are expressed. The exercise of a choice between two modes is not invention, and requires only the skill and judgment of a mechanic.

The counsel for McCloskey, after remarking upon the difference between the present case and the English patent, observes that Winter's belt is to be made of wire, and that wire will not answer the purpose, and he produces the affidavit of John W. Sutton, expert, who states that he made several experiments with an apparatus constructed substantially as shown in the drawings of said Winter patent for the purpose of making a belt of practical use, and found it impossible. He used copper wire and lead rod, and he declares that a wire cannot be rolled thin and punched at the same time, and if it is done it will be of no use. McCloskey claims that his improvement overcomes this practical difficulty, and gives a belt which will work with uniform smoothness and success. There are two considerations which dispose of this objection. In the first place, Winter's belt is not to be made exclusively of wire flattened at intervals, but it may consist

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of copper or any other suitable metal. So that any metal capable of a useful application may be employed. It is, therefore, left to the discretion of the machinist, according to his knowledge in metallurgy, to use that which is the most economical and best adapted to the device. Besides, we have seen that, at the date of McCloskey's application, driving belts of steel, iron, copper, or brass were treated of in different patents, and that there was nothing new in punching metal during the process of rolling.

In the next place, it is true that Winter gives an explanation of how he manufactures the belt. But it is only the combination itself which is claimed. The failure of McCloskey's expert to produce a good belt is immaterial. He sets up no claim to a process, and describes none.

In *Cohn v. United States Corset Company*, 3 Otto, 386, the Supreme Court say:

"It is quite immaterial, even if it be a fact, that the Johnson specification is insufficient to teach the manufacturer how to make the patented corset. It is enough if it sufficiently describes the corset itself. Neither it nor the plaintiff's specification exhibit the process of making. Neither of them sets up a claim for a process. The plaintiff claims a manufacture, not a mode of making it; and the important inquiry, therefore, is, whether the prior publication describes the article. To defeat a party suing for an infringement, it is sufficient to plead and prove that the thing patented to him has been patented or described in some printed publication prior to his supposed invention or discovery thereof. (Rev. Stats., sec. 4920.) What is required is a description of the thing patented, not of the steps necessarily antecedent to its production."

The doctrine thus announced is applicable here. What has already been said regarding the state of the art shows that the whole operation of constructing the device might be properly left to the ordinary skill and judgment of the manufacturer, and that dissimilar methods may be employed in constructing the combination without affecting its originality.

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Even if the process described by Winter were utterly useless, it would amount to nothing here; for it is not the process that is claimed, but the product, consisting of a pulley armed at intervals with projections to be used with a metallic belt having holes. The construction of this contrivance can be easily understood by referring to the latter part of Winter's description. There the metallic belt is represented with perforations, and the pulley with teeth. These are to be at equal distances, and to fit into each other. Can there be any doubt about this contrivance, or that the statement of it would clearly suggest to a person the claim described by McCloskey? We think not; and are, therefore, of opinion that the reference to the English patent, taken in connection with the state of the art, would enable any mechanic skilled in that art to construct the device. And all the decisions agree that when these circumstances co-exist they will be sufficient to invalidate any application for a subsequent patent.

The decision of the Commissioner is affirmed.

CARTER, Ch. J., dissented.

IN RE DENNIS JACKSON, BY C. M. SMITH, HIS ATTORNEY.

AT LAW.—No. 11,948.

- I. Where a prisoner has been convicted on three several informations in the Police Court, and sentenced to be imprisoned three several terms of one hundred and eighty days each without any specification as to the time of beginning or ending of the last two terms of imprisonment, it was held that he could not be imprisoned for a period exceeding that of a single sentence.
- II. It is now well settled that in a criminal case there is no error in a judgment making one term of imprisonment commence when another terminates; but this should form part of the judgment.
- III. Process after judgment must strictly follow the latter. Mere process, like a warrant of commitment, cannot be resorted to for the purpose of enlarging what the court has solemnly adjudicated.

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STATEMENT OF THE CASE.

A writ of *habeas corpus* was issued by the justice holding the criminal term on the 9th day of May, 1877, upon the petition of Dennis Jackson, alleging that he was unlawfully restrained of his liberty by John S. Crocker, warden of the District jail, by reason of an unlawful sentence of the Police Court of the District of Columbia. The return of the warden sets out as the cause of the detention that he holds the relator by virtue of three commitments issued by the said Police Court, reciting that the relator had been convicted in three several prosecutions, and sentenced to be imprisoned in each case one hundred and eighty days in said jail; that in the last case he was also to pay a fine of three hundred dollars, or in default to be imprisoned a further period of one hundred and eighty days. The return further shows that Jackson is now serving the period of imprisonment as under the third commitment, prior to default being made in payment of the said fine.

The record, certified by the clerk of the Police Court, discloses the fact that Jackson was convicted before the Police Court on three several informations, respectively numbered 3,670, 3,671, 3,672.

In the first case the record contains the following entry: "Defendant arraigned January 1, 1876; plea, not guilty; judgment, guilty; sentence, one hundred and eighty days in jail; committed." In the second case the entry is: "Defendant arraigned January 1, 1876; plea, not guilty; judgment, guilty; sentence, one hundred and eighty days in jail; committed." And in the third case the entry is: "Defendant arraigned January 1, 1876; plea, not guilty; judgment, guilty; sentence, one hundred and eighty days in jail and a fine of \$300, or in default a further period of one hundred and eighty days in jail, unless the fine be sooner paid; committed." It is contended that the last two terms of imprisonment are not good in law, for the reason that there is no specification of the time at which the same are to begin or end. The objec-

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tion was not sustained by the justice holding the criminal term, who accordingly made an order, on the 16th day of May instant, dismissing the writ and remanding the prisoner to the custody of the warden. The case is here on appeal from that order.

C. M. Smith, for petitioner.

Francis Miller, Assistant District Attorney, for the warden.

By the COURT:

The relator appears to be imprisoned for three several terms of one hundred and eighty days each, without any specification as to the time of beginning or ending of the two last terms of imprisonment. The sentences pronounced by the court do not provide that the period of imprisonment under these convictions are to commence at any future period, or after the expiration of the period mentioned in the former judgment. This omission is fatal to any imprisonment which exceeds that of a single sentence. The law is well settled that in a criminal case there is no error in a judgment making one term of imprisonment commence when another terminates, and when this forms part of the sentence, the judgment is then considered sufficiently certain as to the time when the successive sentences are to be carried into execution. (*Rex v. Wilkes*, 4 Bur., 2577-8; *Kite v. Commonwealth*, 11 Mete., 585; *The Commonwealth v. Leath*, 1 Va. Cases, 151.)

It was contended at the argument that the commitment might be resorted to as part of the record for the purpose of justifying the imprisonment beyond the first conviction, and it was sought to give effect to a memorandum on the commitments that they were to take effect after each other. In the first place, it is a rule that all process after judgment must strictly pursue the latter. A mittimus is merely to furnish the officer to whom it is directed a justification for the detention of the prisoner. It cannot be used to control or vary the judgment, which is the only matter that can be carried into effect. So that even if this memorandum were embodied in

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the commitment, it could have no effect, for the reason that mere process can never be resorted to for the purpose of enlarging what the court has solemnly adjudged. The sentences in the second and third cases do not state that each imprisonment is to commence from and after the expiration of the imprisonment in those which preceded, and that important modification could not be added by a memorandum on the process.

The order dismissing the writ must be reversed, and as the relator has undergone confinement for the full period of a single sentence, he must be discharged from further custody.

THE UNITED STATES, TO USE OF TUCKER & SHERMAN, v. LEMON G. HINE.

AT LAW.—No. 15,975.

- I. A levy and seizure by a constable of the property of persons not defendants in the execution, is a breach of the condition of his official bond for which the sureties are liable.
- II. An unsatisfied judgment against the constable for the conversion of the property wrongfully seized by him, is no bar to an action on his bond against such sureties.

STATEMENT OF THE CASE.

This action was brought on a constable's bond executed by the defendant as surety, with Obadiah Kimmell and William H. Maack, in the penal sum of \$5,000. The bond was duly approved, and filed with the clerk of the court June 30, 1871, as required by law. It was conditioned that Kimmell should "well and faithfully perform the duties of his office as constable for the county of Washington, * * and faithfully pay over all moneys coming into his hands to the persons entitled to receive the same," &c.

The substance of the second count is, that Tucker & Sherman, in cause No. 10,973, at law, in this court, January 14, 1874, recovered judgment against said Kimmell and one

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Charles A. Kimmell, for the property and for damages and costs, in an action of replevin, for the wrongful seizure by them, as constables for the county of Washington, of the goods and chattels of said Tucker & Sherman; and the amount of damages and costs is \$127.27. A writ of *feri facias* was issued and returned *nulla bona*, January 21, 1874, and said judgment is still in force and entirely unsatisfied, by reason of which wrongful acts and neglect the condition of the bond was broken and action accrued unto plaintiff.

To this defendant demurred, and the plaintiff filed a joinder in demurrer.

The demurrer was certified to the general term to be heard in the first instance.

The question presented by this record is whether a levy by a constable of an execution upon the property of persons not defendants is a breach of the condition of his official bond for which the sureties are liable; also whether an unsatisfied judgment against the constable for the conversion of the property wrongfully seized by him is a bar to an action on his bond.

A. C. Bradley, for plaintiff.

A wrongful seizure by a constable *colore officii* is a breach of the condition of his bond to "well and faithfully perform the duties of his office." (*City of Lowell v. Parker*, 10 Met., 309; *Greenfield v. Wilson*, 13 Gray, 384; *People v. Schuyler*, 4 Comstock, 173; *Ohio v. Jennings*, 4 Ohio State, 418; *Carmack v. Commonwealth*, 5 Binney, 184; *State v. Shaklett*, 37 Mo., 280; *Commonwealth v. Stockton et al.*, 5 Monroe, 192.)

N. H. Miller, for defendant Hine.

"The statute is to be strictly construed in favor of the sureties, who are not to be held responsible beyond the very terms and scope of their undertaking." (*The People v. Straker et al.*, 8 John., 390.) A surety is not answerable beyond the scope of his engagement. (*Walsh and Beekman v. Bailie*, 10 Johnson, 180.) Distinction between acts done *colore officii*

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and *virtute officii*; the act being of such a nature that his office gives him no authority to do it; the sheriff is not protected by the statutes. (*Seeley v. Birdsall*, 15 John., 268; *Alcock v. Andrews*, Esp. R., p. 542.) The condition of a sheriff's bond does not extend beyond non-feasance or misfeasance in respect to acts which he is required to perform officially. (*Ex-parte Reed*, 4 Hill, pp. 572-574.) Where a sheriff, having an execution against the goods and chattels of one person, levies upon and sells the goods of another, it is not a breach of the condition of his official bond, and does not make his sureties liable to the party whose property is taken. If an officer seize the property of a person not named in the writ, it is not an official act done by virtue of his office, but unofficial and done by color of the office. In such case the officer is guilty of a tort for which he is liable as an individual to the party injured, but it does not entitle the party to prosecute the officer upon his official bond. (*State v. Conover*, 4 Dutch., 224, 233.)

CARTTER, Ch. J., delivered the opinion of the court, to the following effect:

This case presents the question whether the surety on a constable's bond is liable where the constable seizes the property of a third person who is a stranger to the execution. All the authorities cited in the brief of plaintiff's counsel unite in deciding that he is liable. This principle is sustained by the Court of Appeals in New York, in 4 Comstock, 173, overruling a former decision the other way in 4 Hill, 572. The Supreme Courts of Pennsylvania, Ohio, and Massachusetts have held the same way. It appears from the citations that New Jersey stands alone in holding that the sureties are not liable for the act of the officer in such a case. We are disposed to adopt a doctrine that is sustained by such weight of authority. This will not necessarily impose a hardship upon the constable, for he can require indemnity for his protection and for that of his surety in all cases where he

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desires to act in good faith and proper care under suspicious circumstances.

The principle will probably have a salutary influence on the conduct of these officers in preventing vexatious levies, and will cause them to enforce legal process without abusing or perverting its authority, now becoming a subject of almost daily complaint.

The counsel for the defendant assumed that the recovery by the plaintiffs in the replevin suit presented a bar to this action. We think otherwise. That was an attempt to exhaust the remedy against the principal before calling upon the surety, but does not estop the plaintiff from resorting to his remedy against the latter when, as in this case, he has failed to obtain satisfaction from the former.

The demurrer is overruled, with leave to plead over.

IN THE MATTER OF THE ESTATE OF HORATIO AMES.

FROM PROBATE COURT.

- I. The justice holding a special term and exercising the powers of the late Orphans' Court in the District of Columbia has authority to refer exceptions to an account of an administratrix for examination to a special auditor, and to determine objections to the report of such auditor, and to settle and adjust the accounts according to the facts of the case.
- II. The justice holding the Orphans' Court, in settling such account, may disallow credits therein for payments made by the administratrix in her own wrong, and may also direct her to pay over to the administrators *de bonis non* the amount found due from her after such account is so adjusted. Such justice would probably direct a suit at law against her and her bail rather than to enforce collection of the same by proceedings of attachment for contempt.

STATEMENT OF THE CASE.

This is a controversy in regard to the settlement of an administratrix's account in the Orphans' Court. Horatio Ames

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died January, 1871, in the State of Connecticut, and the executors in his will refusing to qualify, his widow, Charlotte L. Ames, was appointed in that State administratrix with the will annexed. Some years prior to his death the deceased had an agreement with the Navy Department, under which he furnished a number of guns to the government, some of which were paid for in his life-time, and the balance not until afterwards. A further sale of guns being negotiated, after his death, the said Charlotte L. Ames was also appointed administratrix with the will annexed, by the special term of the Supreme Court of the District of Columbia, doing business in probate. In February, 1869, Horatio Ames employed one Clifford Arrick as counsel in the matter of his claim against the United States, and, for his services in that respect, the said Arrick was paid by the administratrix several sums of money, and she now claims a credit for such payments on her account rendered in the Orphans' Court. The account of the administratrix was filed in June, 1873, and exceptions thereto were filed on the 5th day of August following by Oliver Ames, a brother of the said Horatio Ames, and an alleged creditor of the estate. It is claimed by Oliver Ames that he was the owner of the works in Connecticut at which all of the guns were manufactured for the government, and that he is equitably entitled to the payments therefor made by the United States; and he exhibited before the auditor a transcript of a judgment of the Superior Court of Connecticut, for the county of Litchfield, which determines that he, the said Oliver, is entitled to the entire ownership of the guns and the equitable right to their proceeds, and that the said Horatio Ames, in his dealings with the government, was acting as his agent. This is the effect of the judgment as stated by the auditor. The latter, however, held that, under the circumstances of the case, the money received by the administratrix from the United States was properly assets in her hands, whatever might be the equitable claim of the said Oliver; and that as the amounts were paid here they were properly to be accounted for as assets of the estate in this

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jurisdiction. In her account, the administratrix charged herself with the amounts paid her by the United States on account of guns, &c., aggregating \$39,955, and she claimed credit and allowance for the following:

April 4, 1873. By cash paid as per voucher	
'No. 1 -----	\$125 00
May 2, Voucher No. 2 -----	5,000 00
May 2, Voucher No. 3 -----	14,324 36
May 2, Voucher No. 4 -----	14,250 00
Register of wills, stating account -----	8 15
May 2, 1873. By commission on \$39,955 at 6½ per cent. -----	2,596 07
Total -----	\$36,304 58

The account was excepted to by Oliver Ames on the ground, principally, that the amounts received should be accounted for to him as administrator in the State of Connecticut, and that the whole amount belonged to him, and that all the credits should be disallowed. Three items of said credits, amounting to \$33,574.86, were paid to Clifford Arrick for the services already mentioned, and which were in addition to large sums which he had received during the life-time of Horatio Ames.

An order was passed referring these exceptions to James G. Payne, on the 17th day of March, 1874, who made a report allowing the administratrix credit for only \$5,495.50, on the vouchers she presented for moneys paid to Arrick. Upon the coming in of this report the administratrix filed the following objections:

First. Because said report was made and filed without any authority of law.

Second. Because the orders passed in the cause by the justice holding a special term and exercising the powers and jurisdiction of the late Orphans' Court of the District of Columbia, on the 5th day of August, A. D. 1873, and on the 17th day of March, 1874, were, and each of them was, without any authority of law, and void for want of jurisdiction.

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And for these causes moved that said report and the said orders be vacated and set aside; which the said justice refused.

The administratrix, without prejudice to said motion or to her objection to the jurisdiction of the court therein raised, then filed certain exceptions to said report, viz.:

First. Because said auditor erred in disallowing the debts or claims, or any portion thereof, paid by her as administratrix and mentioned in her said account, the same having been duly proved before payment.

Second. Because her right to a credit for the said debts or claims so paid could not then be controverted.

Exceptions to said report were also filed on behalf of Oliver Ames, to the allowance of ten per cent. on \$5,495.50, credited Mrs. Ames by the auditor, on the sums she had paid Mr. Arrick.

Upon consideration of the exceptions, the court below passed the following decree January 28, 1876:

“This cause coming on to be heard upon the papers relating to the estate of Horatio Ames, deceased, filed in this court, and upon the first account of said administratrix, and the vouchers numbered 1, 2, 3, 4, and 5, filed therewith, and the exceptions to said account filed on behalf of Oliver Ames, and upon the report of the special auditor, James G. Payne, Esq., filed on the 6th day of July, 1875, and the depositions of Clifford Arrick and others filed therewith, and the exceptions to said report filed on behalf of said administratrix, and on behalf of said Oliver Ames, and the depositions and exhibits thereto, notwithstanding objection of counsel for said Charlotte L. Ames, to the deposition of Oliver Ames as incompetent, having been read to the court, and the matter having been argued by counsel, for said administratrix by James S. Edwards, and by Messrs. Stanton and Worthington, counsel for said Oliver Ames; after consideration thereof, it is this 22d day of January, 1876, ordered, adjudged, and decreed that the report of said special auditor be, and it is hereby, ratified and confirmed, except in so far as it allows

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said administratrix credit for \$2,500, as being due Clifford Arrick for professional services in the collection of \$25,000 from the United States, on the 11th day of April, 1871, and in that respect said report be, and hereby is, overruled.

"And except also inasmuch as it allows said administratrix a commission of six and a half per cent. on \$39,955, and that in that respect said report be, and hereby is, overruled, and said administratrix is hereby allowed a commission of five per cent. on said sum of \$39,955, for her commission as administratrix in this case.

"It is further ordered, adjudged, and decreed that the exceptions to the report of the said special auditor, filed on behalf of said Oliver Ames, so far as they relate to an allowance of ten per cent. on \$39,955 to said administratrix, be, and they are hereby, overruled, and in other respects they are sustained; and that the exceptions to the said report of the special auditor, filed on behalf of said administratrix, be, and they are hereby, overruled. Said administratrix is hereby charged with the sum of \$39,955, the amount received by her as stated in her said account, and she is credited with \$125 due James O. Clephane, with \$4,955.50 due Clifford Arrick, and \$1,997.75 hereby allowed her for commission as administratrix; and she is hereby directed to pay over to Nathaniel Wilson, administrator *c. t. a., d. b. n.*, of the estate of Horatio Ames, deceased, on or before the 8th day of February, 1876, the sum of \$34,876.75."

From this decree the administratrix appealed.

The testimony is voluminous and the facts somewhat complicated; but this statement probably contains all that is necessary to an understanding of the decision. Nathaniel Wilson has been appointed at the special term of this court administrator *de bonis non*.

James S. Edwards and *Ross & Dean*, for Charlotte L. Ames, urged the following points:

I. Oliver Ames, who appears and opposes the account and the credits for the sums paid by the administratrix of his

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brother's estate to Mr. Arrick, has no standing in court; because there is no evidence in the case that he is a creditor of the estate, alleged over the signature of his solicitor. He produces no account or claim whatever, nor any memorandum showing an indebtedness from his brother's estate. Nor is there any testimony tending to show that the administratrix had notice of any claim from him as a creditor of the estate. No bill or account is made out or presented in any form, and the record contains no voucher or proof of a claim of his.

Neither is there any testimony to sustain the allegation that the estate is insolvent; to the contrary, it appears from the record that after being credited with all the sums the administratrix presents vouchers for, there is a balance in her hands for distribution of \$3,650.42.

II. The justice holding the special term as a Probate Court had no jurisdiction to appoint a special auditor. All proceedings under the orders of August 5, 1873, and March 17, 1874, were *coram non judice* and void.

The limited jurisdiction of the late Orphans' Court, which this court inherited, and is controlled and governed by in testamentary matters and the administration of deceased persons' estates, ought now to be too familiar to this court to require argument or citation of authorities to establish.

The last declaration of the law-making power, when creating an Orphans' Court and regulating its proceedings, was to enact, in express and positive language, which does not require judicial interpretation, that "the Orphans' Court shall not, under pretext of *incidental* power or *constructive authority*, exercise any jurisdiction whatever not *expressly* given by this act or some other law." (Act of Assembly of Maryland, 1798, ch. 101, sub-ch. 15, sec. 20.)

The Orphans' Court is inhibited from the exercise of any power or jurisdiction not expressly given by legislative enactment. They are tribunals, special and limited in their jurisdiction, without any constructive or incidental power. (*Yea-ton v. Linn*, 5 Peters, 228; *Lowe v. Lowe*, 6 Md. Rep.;

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Townsend *v.* Brooke, 9 Gill, 91; Scott *v.* Burch, 6 Har. and John., 67; Brodess *v.* Thompson, 2 Har. and Gill, 120.)

III. Mrs. Ames, as administratrix, having, in good faith, paid Mr. Arrick's bills, after the same were proven as required by law, is entitled to a credit therefor in her accounts, which the court had no right to reject or disallow.

"No executor or administrator shall discharge any claim against the deceased, (otherwise than at his own risk,) unless the same be first passed by the Orphans' Court granting the administration, or unless the same be proved according to the following rules."

The vouchers or proofs of any claim or open account shall be a certificate of an oath or affirmation taken by the creditor before a person authorized to administer an oath, since the death, endorsed on, or annexed to, the account, "that the account as stated is just and true; that he (or she) hath not received any part of the money stated to be due, or any security or satisfaction for the same, except what, if any, is credited." (Act of Assembly of Maryland of 1798, ch. 101, sub.-ch. 8 and 9, secs. 22 and 8.)

IV. The court below directed Mrs. Ames to pay over to Nathaniel Wilson, administrator *c. t. a., d. b. n.*, of the estate of her husband, on or before a certain day, the sum of \$34,876.75, being the balance of the money collected by her and charged to her in her accounts, after making her the allowances mentioned. This is error.

The power of the court to order and require any assets of the decedent to be delivered to an administrator *de bonis non*, is expressly limited by the statute to *unadministered* assets. The court below had no jurisdiction to direct money collected by one administrator to be paid over upon his death or removal to an administrator *de bonis non*. (14 How., 400; 1 Gill and John., 275; 7 Id., 18.)

Walter D. Davidge, on same side, argued that Oliver Ames was not a creditor; that the administratrix had charged herself and discharged in her account; and that the Orphans'

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Court could not make a personal decree against her for assets that she had administered already, and require her to pay them over to the administrator *de bonis non*.

Edwin L. Stanton and *A. S. Worthington* for Oliver Ames, and of counsel for Nathaniel Wilson, administrator *de bonis non*, made the following points :

I. Oliver Ames has an important interest, which entitles him to be heard by the court, in reference to the allowance of Arrick's claim, and on the question of ordering the late administratrix, under section 97 of the Revised Statutes of the District of Columbia, to deliver to the administrator *de bonis non* the unadministered assets of the decedent.

II. It was the duty of the court to reject the claim not merely upon the facts reported by the auditor, but also because the claim had never been proved as required by law.

1. In the brief for the administratrix, on page 8, the Maryland act of 1798, which prescribes the form of proof in certain claims against the estate of deceased persons, is quoted, but a part of the section and sentence upon which counsel for administratrix rely is suppressed. Section 8 of sub-chapter 9 of the act in question, after providing that any claim *on* (not "or," as printed in brief for administratrix) open account shall be accompanied by the affidavit of the creditor, continues in the same sentence with these words: "and, moreover, the account shall appear to have been proved as is required by an act passed at November session, 1785, ch. 46."

The act of 1785, here referred to, after declaring what shall be proper evidence to prove foreign records, wills, bonds, notes, &c., proceeds, by sections 4 and 5, to provide that certain accounts may be proved by the affidavit of any clerk, storekeeper, or disinterested credible person. (Thompson's Digest, pp. 11, 12.)

The evidence which this administratrix files to justify her for the large payments made to Arrick is the affidavit of Arrick himself, appended to each voucher. There is no affi-

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davit by any clerk or disinterested credible person, as required by the act of 1785. She therefore paid the claim at her peril, even if it was a "claim on open account" within the meaning of the law.

2. But this was not such a claim. The Maryland statute evidently contemplated only mutual book accounts between merchants. The act of 1798, above cited, by its sub-chapter 9, provides for the form of proof in certain specified and restricted classes of cases. Sections 1, 2, and 3 refer to the proof of a judgment or decree; sections 4, 5, and 6 to the case of a specialty, bond, note, or bill of exchange; section 7 to a claim for rent; and lastly, section 8 to a claim "on open account." The construction which Mrs. Ames's counsel put upon section 8 would make it apply to nearly every claim against an estate, except those included in sections 1 to 7. It seems clear, however, that the purpose of the Legislature was to provide for the payment of a few classes of claims which are easily proved, and which are usually, if not always, reduced to writing. This, as to section 8, is made manifest by the act of 1785, chapter 46, which is in effect made part of that section, for that act applies *exclusively* to written instruments, and to claims growing out of the "payment or delivery of any money, or the delivery or sale of any goods, wares, merchandise, chattels, or effects."

3. This administratrix paid the claims in controversy without requiring even the affidavit which her counsel concede was necessary. The money was all paid to Arrick on or before the 2d day of May, 1873, as appears from the receipts filed by the administratrix with her account. To each voucher is appended two affidavits made by Arrick, one dated May 2, 1873, the other June 4, 1873. The affidavits which are of the date of the receipts—2d May—are not in form or substance such as the creditor is required to make. The affidavits dated June 4, though in proper form so far as they go, were made after the debt had been attempted to be discharged by the administratrix, and are, therefore,

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no protection to her, even if the statute authorized her to pay such claims on the mere affidavit of the creditor.

III. The court had jurisdiction and power to investigate, as it did, the claim of Arrick.

The power of the Orphans' Court in passing claims against the estate of a deceased person was not confined to strictly legal claims, but every species of indebtedness, whether legal or equitable; nor is its authority in this respect limited to such as are proved according to the act of 1785, ch. 46. It did not derive its power to pass open accounts from the 8th section of the 9th sub-ch. of the act of 1798, ch. 101, nor were its powers on that subject imperatively restricted by it. The object of that section was to restrain the authority of executors and administrators in payment of open accounts not passed by the court to such as were proved in the mode thereby prescribed. The power of the Orphans' Court in passing accounts before payment was derived from the 2d section of the act of February session, 1777, ch. 8, and the 1st section of the 15th sub-chapter, Maryland act of 1798. (*Stevenson v. Shriver*, 9 G. & J., 424.) And under the latter enactment, in determining the issues of fact raised in this case by the account and the exceptions, the court, under the limited jurisdiction of the old Orphans' Court, has power "of directing the conduct and settling the accounts" of Mrs. Ames as administratrix, "of superintending the distribution of the estate," (including that of the residue belonging to creditors at the domicile, and including the ascertainment of the quantity of that residue,) and "of administering justice relating to the affairs of the deceased according to law." (Maryland act 1798, ch. 101, sub-ch. 15, sec. 3.) It has also "full power, authority, and jurisdiction to examine, hear, and decree upon all accounts, claims, and demands existing between * * * persons entitled to any distributable part of an intestate's estate and executors and administrators, and may enforce obedience to and execution of their decrees in the same manner as the Court of Chancery may," (*Id.*, sec. 13;) and whenever either of the parties having such a contest shall

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require, the court may direct a plenary proceeding. Depositions shall be taken in writing and recorded, * * * and court shall give judgment on the bill, answer, and depositions.

IV. The court had jurisdiction and power to order the removed administratrix to pay the newly-appointed administrator *de bonis non* the moneys charged to her account, after making to her all just allowances.

1. The power certainly existed as to \$6,255.64, reported as unadministered in the account of the appellant, or \$6,247.47 after deducting court costs.

2. It existed also as to the whole amount of claims disallowed by the court. Arrick's claim was not proved as required by the Maryland act of 1798, sub-chapter 9, chapter 101. That enactment restrains the authority of executors and administrators in the payment even of claims on open account not passed by the court to such as are proved in the mode thereby prescribed. (*Stevenson v. Shriver*, 9 G. & J., 324.) Under the Maryland act of 1715, chapter 39, section 3, an administrator *de bonis non* might compel his predecessor to account; but under the Maryland act of 1798, chapter 101, sub-chapter 14, section 12, the authority of an administrator *de bonis non* extended only to the things described in that act as assets not converted into money, and not distributed or delivered or retained by the former executor or administrator under the direction of the court.

Kosciuskio's case, 14 How., 412, was one of an appointment of an administrator *de bonis non* after death of the administrator of the first decedent—the administrator *de bonis non* being also executor of the administrator. It was not a case of removal of an administrator for cause and appointment of a successor to him. In the latter case the common law and the law of Maryland have been changed by the act of Congress of February 20, 1846, (9 St. at L., 4 Rev. St. D. C., secs. 974-976.) Where an administrator fails to give additional and sufficient security after being ordered by the court so to do, the court may remove him and appoint an

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administrator in his stead, and "shall further have power to order and require any assets or estate of the decedent which may remain unadministered to be delivered to the newly-appointed administrator *de bonis non*." Effect must be given to the provisions of this statute. It can only be given if the administrator *de bonis non* in such case takes greater power than he would have had at common law or under the laws of Maryland. The act of Congress is a remedial statute, and is to be liberally construed, and in harmony with other legislation on the same subject-matter. By such legislation in many, if not in most, of the American States, an administrator *de bonis non*, appointed on removal of a former administrator, has "full authority to bring suit against the former representatives of the estate as well in regard to any of the assets of the estate which have come into their hands since the decease of the intestate, as for debts due to or other causes of action in favor of the deceased in his life-time, and he will not be estopped by any illegal act of the former representative." (3 Redf. on Wills, 102; *Collends Adam v. Donaldson*, 17 Ohio, 264; *Hardwick v. Thomas*, 10 Ga., 266; *Potts v. Smith*, 3 Rawle, 361; *Shackelford v. Runyan*, 7 Humph., 141; *Bell v. Speight*, 11 Humph., 451.)

Mr. Justice OLIN delivered the opinion of the court:

The decree of the court in special term for probate business is affirmed. We have no doubt that the judge of that court had authority to settle and adjust the account of the administratrix, and that settlement was quite as favorable to the administratrix as the proof in the case would justify. The only doubt which the court entertains is as to the propriety of the latter clause of the order made by the justice directing the administratrix to pay over to Wilson the amount found due from Mrs. Ames, the administratrix; Mrs. Ames claiming that the amount of \$34,876.75, having been paid over to Clifford Arrick, was administered, and no order could have legally been made directing her to pay that sum over. Without definitely deciding that question, it will

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be sufficient to say that, if application be made to the court below to enforce that order, direction will probably be given to resort to a suit at law against Mrs. Ames and her bail, rather than to the summary proceeding of attachment for contempt or for disobedience of the order of the court.

PHOENIX MUTUAL LIFE INSURANCE COMPANY v. ALBERT GRANT, A. THOMAS BRADLEY, AND ENOCH TOTTEN, TRUSTEES; LEWIS LADOMUS, WILLIAM P. ELLISON, TRUSTEE; ALBERT G. RIDDLE AND WILLIAM D. BALDWIN, TRUSTEES; S. LEDYARD PHELPS, EDWARD M. GALLAUDET, AND HALBERT E. PAINE, TRUSTEES; HENRY S. DAVIS AND RALEIGH W. DOWNMAN, TRUSTEES; LEWIS B. PIERCE AND HALBERT E. PAINE, TRUSTEES; HORATIO BROWNING, LEONIDAS SCOTT, JOHN J. SULLIVAN, JOHN FRAZER, JOSEPH CUNNINGHAM, JOHN W. KENNEDY, JOHN E. KENDALL, AND WILLIAM H. RHAUN.

- I. This court has jurisdiction of a bill to foreclose deeds of trust upon real estate given to secure the payment of separate debts, especially when it appears upon the face of the bill that the property has been subdivided, and the parties in interest are numerous and the complication of right is great.
- II. Where the principal defendant in such bill sets up in his answer and plea that he has fully paid all claims of the complainant, the issue thus presented is of such a character that it ought to be tried by the court before an order of reference to the auditor to take an account is passed.

The case is stated in the opinion of the court.

W. F. Mattingly and *R. T. Merrick*, for plaintiff.

B. F. Butler, *T. J. Durant*, and *O. D. Barrett*, for defendant Grant.

Mr. Justice WYLIE delivered the opinion of the court:
On the 1st of September, 1868, the defendant Grant was

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the owner of all of square number 760 in this city, having purchased said square from Lewis Lodomus and William P. Ellison, and executed two several deeds of trust on the same to secure the payment of the purchase-money, amounting to \$47,287.14. Subsequently he subdivided the square into lots numbered from 1 to 30 inclusive. Having paid off all the debt for the purchase-money except \$11,658.14, the trustees, with the consent of the late owner, released the lien from all the lots except those numbered 5, 6, and 13. The balance of the claim was then assigned, for value, to the complainant in this cause.

On the 9th of September, 1870, Grant placed another deed of trust on lots 5, 6, 9, 10, 11, 16, and 17, to secure a debt of \$10,000 to S. Ledyard Phelps. From this lien lots 9, 10, and 11 were subsequently released, and the claim assigned to the complainant.

On the 27th May, 1871, he placed another deed of trust on lots 1, 2, 3, 4, 8, 9, 10, 11, 12, and 14 to secure ten of his promissory notes given to the complainant for \$10,000 each.

On the 26th of August, 1871, he placed another deed of trust on lots 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 14, 16, and 18 to secure four promissory notes to Winfield S. Fletcher for \$10,000 each. These notes have also been assigned to the complainant.

On the 1st of January, 1872, he placed twelve other several deeds of trust on lots 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, and 14 to secure on each lot respectively different promissory notes, amounting in the aggregate to \$81,000.

All of these notes bear interest at the rate of ten per cent. per annum, payable semi-annually, and are overdue.

These deeds of trust all omit to provide for the length of notice to be given in case of sale, and for the place of sale.

On the 24th of April, 1873, Grant placed another deed of trust on lots 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, and 14 to secure another note given to the complainant for \$60,000, also bearing interest at the rate of ten per cent. per annum, payable semi-annually.

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Thus far, as the bill alleges, all the debts so secured upon the property are in the hands of the complainant in this suit.

A number of subsequent purchasers from Grant, besides several judgment creditors, have been made parties defendant.

The object of the suit—the alleged debts being all overdue—is to have the several pieces of property covered by any of these numerous deeds of trust now held for the use of the complainant sold under decree of the court for the payment of the debts.

A number of dwelling-houses had been erected on the property by Grant, one or two only of which were completed, and others at different stages towards completion. One of those completed was occupied by Grant himself.

After the filing of the bill and due notice to Grant, a receiver was appointed, with his consent, to take possession of the houses, excepting, however, the one which Grant himself occupied and one other, the rents of which he was permitted to collect, with authority to rent them out and apply the proceeds towards their completion, and further to mortgage them, if found practicable, to raise money to be so applied. We find no fault with the action of the court below in respect to these orders, but think they were proper under the circumstances.

Objection has been made to the jurisdiction of the court to decree a sale in this case, on the ground that by the contract of the parties the sales were to be made by the trustees named in the several deeds of trust, and that in this respect deeds of trust differ from mortgages.

We think, also, that this objection is untenable. In this District that jurisdiction has always been exercised by the court, and never before, that have we known, has it been disputed. Innumerable titles rest upon it, and unexampled distress and confusion would follow a contrary decision. In Willard's Equity Jurisprudence, 451, the author says: "A summary mode of foreclosing mortgages at law by advertisement and sale is provided by statute for those cases where the mortgage contains a power to the mortgagee or any other

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person to sell the mortgaged premises upon default being made in any condition of the mortgage. (2 Rev. Stat. N. Y., 545.) There are many cases where this remedy cannot be applied, and there are none in which it supersedes an action in a court of equity. The latter is, therefore, with us, the most usual as well as the most effective remedy in cases of non-payment of demands secured by mortgage." And in 4 Kent's Commentaries, 190, 191, the author says: "In New York, and probably in other States, a sale under a power is made the subject of a statute provision; but, as the title under such a sale does not affect any mortgage or judgment creditor whose lien accrued prior to the sale, it must be rather hazardous and unsatisfactory title, and far inferior to one under a decree in chancery, founded on a view of the rights—and which bars the rights—of all incumbrances who are brought before the court." Here, so far from intimating a doubt as to the jurisdiction of the court of equity in such a case, the author declares that the title of the purchaser at the sale by the trustees under a power must be rather hazardous and unsatisfactory, and far inferior to one under a decree in chancery. And although the practice of providing for sales under a power in the mortgage has been growing in England as well as in this country, Lord Eldon, in *Roberts v. Bezon*, considered it to be an extraordinary power of a dangerous nature, and one which was unknown in his early practice.

In 2 Cooley's Blackstone, 159, note 15, the author of the note, speaking of mortgages with a power of sale, says that the mortgagee may file his bill in equity as in other cases.

Besides this, the present case contains many particular features which seem to render the jurisdiction of the court absolutely indispensable in order that a fair sale should be made, and bidders should know beforehand that they could get a valid title under a decree in which the rights of every person having a claim upon the property had been ascertained and settled.

From the face of the bill it appears that the property in question has been subdivided into numerous lots. Some of

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the deeds of trust are liens upon all the lots; others upon some of them only. Payments have been made on account of some of the claims, and none upon others. The aggregate liens exceed the value of the property, and the owner is apparently insolvent. Purchasers from Grant subsequent to liens are parties to the bill, and in justice to them the securities should be marshalled. The parties in interest are numerous, and the complications of rights is so great that nothing can settle them except a decree in equity.

In *Caldwell v. Tuggart*, 4 Peters, 201, the court says: "In reply to all these grounds of counsel for want of parties or for want of due maturation for a final hearing, it has been urged that nothing is ordered to be mortgaged or sold beside Caldwell's own interest, whatever that may be. But this we conceive to be an insufficient answer. It is not enough that a court of equity causes nothing but the interest of the proper parties to change owners. Its decrees should terminate, not instigate, litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium estimation. It has the means of reducing every right to certainty and precision, and is therefore bound to employ those means in the exercise of its jurisdiction."

The foregoing contains our view of the case presented by the bill alone. This bill was filed on the 17th April, 1875. Receivers were appointed as to ten of the twelve houses on the 7th May, 1875, with the consent of Grant, the court allowing him to retain the possession of two of the houses. On the 6th of July, 1875, Grant filed a general demurrer to the bill. This demurrer was not argued till the 8th day of November, 1875, when it was overruled, and the defendant allowed twenty days in which to file an answer. In the meantime, on the 11th of November, a decree *pro confesso* was passed against all the trustees named in the several deeds of trust and some other nominal parties. On the 27th of November Grant filed his answer and cross-bill, and at the same

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time set up the same matters, by way of plea, which were contained in the answer and cross-bill. On the 23d of December complainant filed its demurrer to Grant's cross-bill.

Several dilatory motions were made between this last date and the 15th of March, 1876, upon which day an order was made allowing the demurrer to the cross-bill, and giving the defendant Grant ten days to amend his cross-bill. On this day, also, several other motions in the case were disposed of by the court which require no special reference, and Grant appealed from the order allowing the complainant's demurrer to his cross-bill. Of course, under our practice, no appeal could be taken in such a case; but since the present appeal has brought up the whole case with all the interlocutory orders, it is proper that we should dispose of this point also. By his cross-bill Grant had sought to bring into the case numerous parties who were not parties to the original bill.

In *Shields v. Barron*, 17 How., 130, the Supreme Court decided that parties cannot be forced into court in this way, nor can new parties be brought into a cause by cross-bill. We perceive no error, therefore, in the order of the court below sustaining the demurrer to the cross-bill and giving leave to amend.

The pleadings in the cause at this time consisted, therefore, of the original bill, the defendant's demurrer to the same which had been overruled, his answer and cross-bill, with a plea setting up the same matters embraced by these, and the complainant's replication, which was not filed till this date, 15th March, 1876, and the demurrer to the cross-bill which had been allowed.

The form of the replication was that "the plaintiff hereby joins issue with the defendant, Albert Grant." It would have been more artistic had a separate replication been filed, in the usual form, both to the pleas and to the answer. We have no doubt, however, that it intended to apply to all, since the matters set up by way of plea were the same, substantially, with those of the answer.

The cause then, after about a year filled with the conten-

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tions of the parties over minor points, was brought to an issue of fact on the 15th of March, 1876, and no evidence taken on either side. On the 3d of April, 1876, and before the period for taking testimony had expired, on motion of complainant's counsel, the court ordered a reference of the cause to the auditor, with instructions to "state the account between the plaintiff and the defendant Grant, the amount due under the several deeds of trust referred to in the proceedings in this cause, the several incumbrances upon the real estate particularly referred to in this bill, and the priority of the respective liens." And, in our view, the cause, as it is now before us, depends entirely upon the regularity of that order.

We are all of opinion that the order of reference to the auditor was erroneous in the condition of the cause at that time. In 3 Greenleaf's Evidence, sec. 332, citing *Lunsford v. Bonton*, 1 Dev. Eq. R., 483, and *Holden v. Hearn*, 3 My. & K., 445, the rule is thus broadly laid down: "A reference to the master is never made to establish, in the first instance, a fact put in issue by the pleadings, and constituting an essential element in the controversy."

Without adopting this rule, as thus laid down, in its full extent, we are of opinion that the issue of absolute payment of all these claims set up by the defendant Grant in his answer, in his plea, and in his cross-bill, and sworn to by him, was of such a character that it ought first to have been tried by the court itself, upon testimony taken by the parties in the usual way; for if that defense were once made out, there would be no need to have an account or a marshalling of securities. But the bill must be dismissed.

It is true, however, that no such rule seems to have been applied by the Supreme Court of the United States in *Field v. Holland*, 6 Cr., 25, where Chief Justice Marshall said: "A court of chancery may, with perfect propriety, refer an account to an auditor, and on the return of the report determine such questions as may be contested by the parties." The same principle was carried still further in the case of *Penn-*

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sylvania v. The Wheeling Bridge Co. et al., 13 How., 518, in which case a special commissioner was appointed by the court to ascertain and report the facts in controversy, and the court held that his report was equivalent to the finding of a jury upon all the facts in issue between the parties. The whole case was decided upon the report of the commissioner.

It is not necessary, therefore, to examine in detail the exceptions to the auditor's report in this case, since, for the reasons stated, the reference to the auditor and the auditor's report must be wholly set aside, the decree reversed, and the cause remanded for further proceedings, to commence with the date when the issues were made up.

WILLIAM W. BALLARD, TALMADGE E. BROWN, AND
EDWARD L. MARSH *v.* THE DISTRICT OF COLUMBIA.

AT LAW.—No. 13,494.

The plaintiff made a proposal to the Board of Public Works to put down certain pavements, the board to designate the streets when the plaintiffs should be ready to commence. The assistant secretary of the board embodied the proposal in a letter accepting it, signed by his name alone: *Held*—

- I. That this was not a contract executed as prescribed by law, and was not binding on the District in an action to recover damage for a failure of the board to designate such streets.

STATEMENT OF THE CASE.

Demurrer to declaration. The alleged contract for a breach of which this action is brought is contained in an exhibit to the declaration, and is expressed as follows:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
WASHINGTON, December 10, 1871.

TO BALLARD PAVEMENT Co.,
Washington, D. C.:

Your proposition of this date, as follows:

"The Ballard Pavement Company hereby make proposals for the following work, with accompanying conditions. We

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will put down preserved wood pavement as follows: The Ballard block, the Perry block, or the wedge-shaped block, such as laid by Filbert & Taylor in this city, as the contractors may elect, either to stand five inches high, for three dollars and fifty cents per square yard, and we hereby ask for seventy-five thousand square yards, contractors to have during the year 1878 within which to complete this work; the board not to stop the work without a gross violation of the contract on the part of the contractors. The streets to be designated by the board at such times as the company shall be ready to commence work. Said work to be paid for as the same progresses.

“ We also hereby apply for a separate and a further contract for so much of the grading, hauling, and filling as is not embraced in the contract for paving and for setting the curbing on the streets to be paved by us at board prices, subject to the conditions of the paving contract,” is this day accepted.

By order of the board.

CHARLES S. JOHNSON,

Assistant Secretary.

After stating the contract, plaintiffs allege in the declaration that they entered upon their part of the contract, provided the material with which to do the said work, and from shortly after the making of the contract, hitherto, they have been prepared and ready to do the said work according to their said contract; that they have repeatedly demanded the said work of the proper authorities representing the District, which authorities have at all times neglected and refused to perform any part thereof, though often requested so to by plaintiffs. Plaintiffs further allege that they have been greatly damaged, to wit, in the sum of one hundred thousand dollars, and they ask judgment for that amount with costs.

The defendant demurred to the declaration as being bad in substance, for the reason that it does not show that the said contract was made by any person authorized by law to bind said District by the terms of the alleged contract. There was

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another ground of demurrer, which is not noticed for the reason that it was not passed upon.

John A. Grow, for plaintiff.

Edwin L. Stanton, for District of Columbia.

CARTTER, Ch. J., delivered the opinion of the court, to the effect following:

The letter bearing the signature of Charles S. Johnson, assistant secretary, is not a contract made in pursuance of law. The thirty-seventh section of the act organizing a government for the District of Columbia requires that all contracts made by the Board of Public Works shall be in writing and signed by the parties making the same, and a copy is to be filed in the office of the secretary of the District. As to the construction of a contract we give effect to the intention of the parties, but when the statute has prescribed a certain form, it must be followed. In order to render the contract binding in this particular, the law requires it to be in writing and signed by the parties, and without this formality it is not complete. The act contemplated a written instrument filed away in the archives of the board and authenticated by their signatures. There is no such officer provided for as an assistant secretary. His signature is not binding on the District, and his letter is no evidence at all of a contract. Besides, this letter simply accepts a proposition to lay any of three kinds of pavements; thus evidently contemplating a contract afterwards to be prepared in form, fixing the kind of pavement to be used when the agreement should be completed. It is to be remembered that the District is sued because the Board of Public Works did not designate the streets upon which work was to be performed, and not to recover for the value of work performed by the plaintiff and accepted by the District; and as the contract by the parties is not executed within the meaning of the statute, we think there is no cause of action, and the demurrer must be sustained.

Meredith v. The District of Columbia.

PHILIP MEREDITH v. THE DISTRICT OF COLUMBIA.

AT LAW.—No. 12,265.

A member of the fire department of the city of Washington cannot maintain a personal action for his monthly salary unless he has actively performed the duties of his office; and the fact that he has been removed without notice of charges and a trial, will not entitle him to this remedy.

STATEMENT OF THE CASE AND DECISION.

The declaration in this case sets forth that the said plaintiff was duly appointed a member of the fire department of the District of Columbia, to hold office during good behavior, and entered upon the discharge of his duties as such, and continued faithfully to discharge said duties and to receive pay therefor until the 1st day of February, 1874, and held himself ready and offered to perform his said duties for the months of February and March, 1874; but the said defendant, on the 30th day of January, 1874, notified him that he had been dismissed from said service, to take effect February 1, 1874. Said dismissal was made without any notification of charges against the plaintiff or any trial thereon, or any opportunity to show cause why he should not be so dismissed, and was without authority of law and void, whereby the defendant became indebted to the plaintiff for the amount of his salary for the months of February and March, 1874, at the rate of \$60 per month, but did not pay the same; and the plaintiff claims \$120, with interest from the 1st day of April, 1874, besides the costs of this suit.

The defendant demurred to the declaration on the following grounds:

1. The declaration does not aver that plaintiff, before entering upon his alleged official duties, had qualified himself by taking and subscribing the oath of office required by law.

2. The declaration does not aver that plaintiff performed the duties of his alleged office for the months of February and March, 1874, for which he sues; or that defendant prevented him from performing the same.

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3. The plaintiff does not sufficiently aver his readiness and offer to perform said duties, and defendant's refusal to accept the same.

4. Plaintiff's proper remedy was by *mandamus*, if he had a clear legal right to the office, and it was not filled at the commencement of the suit; and by *quo warranto*, if the office had been filled, and was so at the time.

The declaration is defective in that it contains no averment as to whether the office was then filled or not.

The thirty-fifth section of the act of the Legislative Assembly, approved August 13, 1871, confers authority upon the Board of Fire Commissioners of the cities of Washington and Georgetown to appoint members of the fire department, who shall hold their places during good behavior, and who may be fined, suspended, or expelled upon the trial of charges, of which they are to have written notice. And the second section of the act of June 26, 1873, which provides for the salaries of the fire department and the other District officers, enacts that in no case shall any part of these salaries be paid unless the duties of the several officers shall be actually performed. The case was certified to be heard at the general term in the first instance.

The court did not express an opinion whether the act of the Legislative Assembly first above referred to was a limitation upon the power of removal, but they were unanimous in holding that, even conceding this to be so, the statutory provision, that in no case should the salaries be paid unless the duties were actually performed, was an absolute prohibition, which operated to qualify the claim of the plaintiff for payment, whether he was removed for cause or not, in case he failed from any cause to perform the duties of his appointment. The plaintiff must therefore adopt some other form of remedy, for it is clear that he cannot maintain a personal action for his monthly salary. Demurrer sustained.

Riddle & Miller, for plaintiff.

William Birney, for defendant.

Millard v. National Bank of the Republic.

**REES J. MILLARD v. THE NATIONAL BANK OF THE
REPUBLIC.****AT LAW.—No. 4259.**

- I. A power of attorney to prosecute a claim against the United States, and to receive any check, order, or certificate issued by the government for the payment thereof, confers no power upon the attorney to assign or endorse the paper in the name of the payee.
- II. When the drawee of such check had settled with the drawer and charged up the amount against him, there is sufficient privity between the parties to enable the payee to recover the amount upon a count for money had and received. This principle is applicable to a case where the bank had paid the check upon a forged endorsement.
- III. The statute of limitations refers to the time of the institution of the suit, and not to the time of filing an amendment to the declaration.

STATEMENT OF THE CASE.

The plaintiff had a claim against the United States for back pay as an officer in the army, amounting to the sum of \$859.59. In 1865 the plaintiff employed a firm of claim agents in the city of Washington to collect the same, and gave them a power of attorney for that purpose, containing a power of substitution, and to receive any check, certificate, or order for the payment of the claim, but no power to endorse plaintiff's name upon it. That firm transferred the claim to Rutgers Teal, who prosecuted it to completion, and on January 17, 1866, received from Colonel J. A. Lawyer, paymaster U. S. A., his check upon the defendant bank, in which he was a depositor, in favor of the plaintiff, and payable to his order for the amount of the claim.

The check was paid to said Teal upon a forged endorsement of the plaintiff's name.

The original declaration set forth in a special count the facts and circumstances of the case. The case went to the Supreme Court of the United States, and that court decided that the action could not be maintained, on the ground that the plaintiff could not sue the bank for refusing to pay the

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check in the absence of proof that it had accepted it, or charged the amount against the drawer; but intimated that if the bank had settled with the drawer, charging him with the amount of the check, that the plaintiff could recover upon the money counts, and sent the case back to allow the declaration to be so amended. (See 10 Wall., 152.) An amended declaration was accordingly filed March 23, 1876, by adding the money counts. On the new trial it was proved that Teal, without authority from the plaintiff, endorsed the plaintiff's name upon the check and presented it to the bank, who paid the amount thereof to Teal, and that the plaintiff never received any satisfaction for the claim. The defendant also admitted that it had charged the said check on its books against the said Lawyer and settled with him on that basis. The defendant offered the following prayer: "The plaintiff having closed his testimony, the defendant prays the court to instruct the jury that upon the whole evidence aforesaid, if the same is believed by the jury, the plaintiff is not entitled to recover in this action;" which instruction the court refused to give, and thereupon the defendants, by their counsel, beg leave to except, and do except, thereto.

R. D. Mussey, for plaintiff, cited 1 MacA., 415; 5 B. & A., 204; 3 B. & C., 280; Moore on Banking, 459; 5 Wheaton, 286.

Bradley & Duvall, for defendant.

I. The record shows a case of misplaced confidence on the part of the plaintiff, by which the defendant was innocently, without any fault on his part, led to a loss; and of these two parties, the loss must fall upon the party in fault. "If one of two innocent persons suffers from the fraud of a third, it should manifestly be he who, by his laches or misplaced confidence, has enabled the third party to commit the fraud." (*Young v. Grote*, 4 Bing., 253—Eng. Com. Law, 13; *Pickard v. Sears*, 6 Ad. and El., 469—Eng. Com. Law, vol. 33; *Matty v. Carstairs*, 7 B. & C., 735.)

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II. This action will not lie, except upon a promise to the plaintiff, express or implied; and there are no facts in this case from which the jury could find or the court could infer either an express or implied promise by the defendant to pay to the plaintiff the money sought to be recovered in this action; and this, because otherwise there is no privity between the parties. (*Williams v. Everett*, 14 East, 582; *Wedlake v. Hurley*, 1 Crompt. & Jar., 13 (read Jones's argument); *Crow v. Rogers*, 1 Stra., 592.) The consideration must move from the plaintiff to the defendant. (*Rogers v. Kelley*, 2 Camp., 123.) Mistake in payment by a bank; the person to whom the money was to have been paid sues the man to whom the money was paid; cannot recover, because no privity. Mistake in payment could not change state of account, and the bank still liable to the depositor. The Supreme Court, admitting this general principle, says, at p. 157: "*It may be*," &c. But this cannot be so. The court says further that the deposit made became the money of the bank, and the bank was answerable to Lawyer for the debt. Lawyer was debtor to Millard. This did not extinguish that debt. His liability remained the same till the bank had promised Millard the payment of that debt. The case of *Wharton v. Walker*, 4 B. & C., 163, (10 Eng. Com. Law, 527,) is directly in point and decisive of this question; and see cases collected in 1 Archb. N. P., 22, 23, 24, margin; Chitty on Contracts, (Perk. ed.,) 617; 1 M. & W., 365; *Bradbury et al. v. Anderton*, 1 Cr. Ch. R., 494. There must be privity between the parties.

III. The statute of limitations is a flat bar to the plaintiff's right to recover.

This action was brought 26th September, 1867. There is no evidence in the case to show when Lawyer settled his account with the bank. That settlement, according to the suggestion of the Supreme Court, is the origin of the defendant's liability. If it was *after* the institution of the suit, the action will not lie. If it was before, the plaintiff was bound to have proved it.

The plea of the statute refers to the time when the cause

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of action accrued, and puts the plaintiff to affirmative proof that it was within three years before action brought. Now, the cause here is set out in the amended *nar.*, and until then the defendant had no notice of the claim on which it was founded. His plea is, that the cause of action did not accrue within three years before the filing of the amended declaration, and upon that issue was joined. It was a material issue, and the plaintiff having failed to offer any proof in support of it, the court was bound to instruct the jury that he could not recover.

The amended *nar.* made a new cause of action, and abandoned the original declaration.

Mr. Justice HUMPHREYS delivered the opinion of the court:

We acknowledge the correctness of the principle stated by defendant's counsel, that "if one of two innocent persons must suffer from the fraud of a third, it should manifestly be he who, by his laches or misplaced confidence, has enabled the third party to commit the fraud." But what is the fact in this case, as appears from the record? The bill of exceptions shows that the power granted by plaintiff was expressly confined to *receive* any check, certificate, or order issued by the government or its agents, but no power to endorse.

The check was payable to plaintiff's order, and was paid to one Teal, who signed the name of plaintiff on the endorsement. Teal is liable to the bank, just as any bank in the city of Washington would be to another which had paid a check. Hence it is, these institutions always look to the responsibility of the person presenting a check. The check was payable to the order of Rees J. Millard; his name was endorsed upon it; but if his name was signed without his knowledge or authority it could not bind him. The object of checks and drafts is the safe transmission of funds from one point to another, payable to the order of the payee. The drawee is always advised, in some way or other, of the identity of the payee, or of the authority of any other person to represent him.

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The record, as we have it printed and presented to us, states expressly, in the bill of exceptions, that Teal endorsed plaintiff's name without his authority. The question then goes back to the proposition, whether a general power of attorney to prosecute a claim, with power to settle the claim and to receive any check or order issued for the payment of the claim, confers the power to sign an endorsement.

Powers of attorney must be construed according to their language and scope.

The parties here were employed to do a particular thing; that was, to prosecute the claim and, if the claim was allowed, to receive any check, certificate, or order. But the check was payable to the order of plaintiff. Teal had no power to assign or endorse the paper in the name of the payee. That was far beyond the scope of his powers, and could not be construed to be within the limits. The object of a power of attorney is to define the extent of the agency, and all persons dealing with a special agent must inquire into his powers. It is stated, in the bill of exceptions, that Teal, without plaintiff's authority, endorsed the check in plaintiff's name. The defendant asked the court to charge the jury, that, upon the whole evidence, the plaintiff was not entitled to recover, which the court refused. We think the Circuit Court did right in refusing the charge. We are informed of no further action by the court, and, of course, cannot arrest the effect of the judgment rendered. The bill of exceptions further shows that defendant had settled with the drawer of the check and charged up the amount. We think this is priority between the parties to maintain the action. The statute of limitations cannot bar if the amendment could be made. The Supreme Court of the United States—it appears from brief of counsel for defendant—remanded this case to give an opportunity to amend, and the amendment was made.

Judgment affirmed.

Washington Market Company v. Summy.

THE WASHINGTON MARKET COMPANY v. BENJAMIN
W. SUMMY.

AT LAW.—No. 15,956.

On the argument of an appeal from an order of the special term quashing a writ of certiorari, it is irregular to read an *ex-parte* affidavit of the magistrate before whom the case was tried. If the return is defective, there must be a motion for a further or amended return to the writ.

STATEMENT OF THE CASE.

Certiorari to justice of the peace. The suit was instituted against the defendant for the possession of certain stalls in the Centre Market, under the landlord and tenant act, before R. V. Hughes, one of the justices of the peace for the District of Columbia. The defendant appeared and filed an affidavit for the removal of the cause to the nearest magistrate. Thereupon it was sent to Charles Walter, Esquire, who was not the nearest magistrate, who took jurisdiction and rendered judgment therein. Walter made return to the writ at the special term, and, on motion of plaintiff's attorney, the writ was quashed and an appeal taken to the general term. At the argument in this court plaintiff's attorney offered to read the *ex-parte* affidavit of said Walter in respect of the proceedings at the trial and judgment in said case. Objection to reading the same was sustained on the ground that it was no part of the return and constituted no part of the record. The opinion will show the views of the court.

William Birney, for plaintiff.

John C. Fay, for defendant.

Mr. Justice OLIN delivered the opinion of the court:

In this case a writ of certiorari was issued directed to Charles Walter, Esq., to bring up certain proceedings had before him on the petition of Benj. W. Summy, alleging that the market

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company brought a suit before R. B. Hughes, Esq., one of the justices of the peace of the District, and on the return day of said summons the petitioner Summy appeared and filed an affidavit for the removal of said cause of action to the nearest magistrate, viz., O. Kimmel; but the said Justice Hughes, in violation of his duty, did not send the cause to the nearest magistrate, but sent the case to Charles Walter, Esq., who took cognizance of the same and set the case for trial, and did render judgment against your petitioner by default; and he avers that the justice was without jurisdiction in the premises, and that his judgment was erroneous and void. The return made to this writ was defective in very many respects, as appears by the affidavit of C. Walter, the justice before whom the cause was tried. And the return to the writ in this case is attempted to be supplemented by the affidavit of the justice before whom the cause was tried. This we think wholly irregular. If the facts sworn to by Justice Walter be true, there is no ground for a writ of certiorari in this case. The judgment of the court is that either party may have liberty to apply for a further and amended return for the writ.

TALBOT C. MURRAY v. DE FORREST P. ORMES, JAMES
M. ORMES, AND WILSON AGER.

No. 12,489.—AT LAW.

Where an endorser had a residence in Washington previous to the making of the notes, and then moved to New York, but left his daughter, who was a member of his family, in possession of such tenement in Washington, together with his servants, and maintained that branch of his family there, stopping there from time to time when he came to Washington on business, it was held that notice of protest served at such house was sufficient.

STATEMENT OF THE CASE.

The defendant Ager was sued as endorser on two promissory notes dated April 11, 1872, each for the sum of \$1,082.33,

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payable at the Freedman's Savings and Trust Company. On the trial of the action it was stipulated by counsel that the only defense made by the said Ager is that there was not due notice of protest of the promissory notes in suit. The plaintiff introduced as a witness W. E. Howard, a notary public, who testified that he presented for payment one of said notes and produced a certificate of protest, which recited that he delivered notice of protest at the residence of said Ager, on E street, between Ninth and Tenth streets, in the city of Washington. He further testified that before delivery of said notice he was advised said Ager resided at that place, and at the time of delivery was informed by the person who answered his inquiries at the door of said residence that Wilson Ager resided there. Witness never heard it intimated, until very recently, that said Ager did not reside there at that time, and never, until the day of trial, heard it intimated that he did not reside at that place at the time of service of said notice. Witness kept a record of his acts as notary public, and read therefrom as follows, to wit: "On the next morning I left a written notice of protest for J. M. Ormes at his residence, Ninth street, between E and F, and I left one for W. Ager at his residence, E street, between Ninth and Tenth streets northwest," and testified that he made said entry at the time mentioned therein, and that he had no further recollection in regard to the matter.

On cross-examination said Howard testified that he had no recollection of the facts, aside from the record made by him; but had no doubt, from his general course of business, that he was informed as to the defendant's residence, and that on inquiry at the door he was then further informed that this was his residence.

In regard to the other note, the plaintiff introduced as a witness Mr. McKenney, a notary public, who presented the other note for payment, and protested it. His certificate of protest was also in evidence without objection, reciting the fact that he had addressed notice of protest to each endorser.

After plaintiff rested, the defendant Ager testified, on his

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own behalf, that in March, 1872, he removed with his wife to New York city, leaving said house here in possession of his daughter and servants; that he boarded with his wife at a hotel in that city a month or six weeks, when he rented a house there, and he has resided in that city continuously since, and that he had not resided nor had a place of business in this city or District since he removed as aforesaid to New York, where was his place of business and of receiving his mail; that he left his daughter and servants in occupation of his house here, because he had taken a lease of it for a year, which did not expire until the following autumn. On cross-examination he testified that he had resided for several years in the house in question in this city, but having an office in another part of the city prior to his removal to New York; that he paid the rent and supported the part of his family he left here; that he frequently visited this city on business, and while here stopped at said house; that a few weeks after he removed to New York he rented a house on ——— avenue, and resided there with his wife; that he paid his rent there monthly, but could not recollect from whom he rented, nor to whom he paid the rent, nor between what streets his house there was located, nor its number; that he did not give up his house here because the term of renting had not expired, and that he did not know whether it was generally known among his acquaintances that he had removed.

The defendant then introduced as a witness his son, E. C. Ager, whose testimony was substantially the same as that of the defendant.

The defendant further testified that no notice was served personally on him, and he had no recollection of having received the notice of protest of either of said notes. Whereupon the court charged the jury as follows, to wit:

“If the jury find from the testimony that the defendant (Ager) had a residence in Washington previous to making the notes, and in March, 1872, moved to New York city for the purpose of a residence there, and continued to reside there until the present time, but left the tenement he had occupied

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in possession of his daughter and servants, and continued to maintain that branch of his family at such tenement, and stopping there from time to time when he came to Washington, and that the notary delivered notices of protest at this house in Washington, then the verdict must be for the plaintiff."

To which charge the defendant, by his counsel, excepted.

The jury returned a verdict for the amount of the notes, with costs of protest and interest. The case is here upon the exception to the charge of the court.

L. G. Hine, for plaintiff.

W. Willoughby, for defendant, cited 6 Mass., 386; 2 Exch., 718; 3 Maine, 233; 1 Pet., 578; 16 Gratt., 284; 9 Wheaton, 198.

Mr. Justice OLIN delivered the opinion of the court :

An action was brought upon two promissory notes against *Ager* as endorser. The defense interposed was that he had not received notice of protest. The notice of protest was left at the residence of the defendant in this city, where the defendant *Ager* had rented a house, and which, at the time of the maturity of the note, was occupied by his daughter and servant, and which he made his home when in Washington on business. On looking through the bills of exception in this case, we think it quite apparent that notice of protest was duly served, and the judgment of the court below must be affirmed.

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THE UNITED STATES v. JOHN BOWEN.

CRIMINAL.—No. 11,576.

- I. At the trial of an indictment twelve of the regular jurors were impanelled in another cause, and were out consulting upon their verdict. Defendant claimed the right, before the impanelling commenced, to have the whole array present and subject to his challenge. The court ruled against the point, and the jury was completed from the other jurors and talesmen, and the ruling of the court was sustained on appeal.
- II. On an indictment for presenting a false claim against the United States for back pay of a deceased soldier, claimed by the defendant to be his brother, the allegation of the indictment was that the brother was named "Major Dabney" and enlisted under the name of "George Bowen"; whereas the proof was that defendant claimed to be the brother of George Bowen, who served under the name of Major Dabney. It was held that the variance was immaterial and the defendant properly convicted.
- III. Previous good character is not sufficient to create such a doubt in the minds of the jury as would of itself justify an acquittal.
- IV. Declarations made to a witness by the father of an illegitimate son is not proof of pedigree.

STATEMENT OF THE CASE.

The defendant was indicted for presenting to the Second Auditor of the Treasury a false claim for the back pay and bounty of a deceased soldier named Major Dabney, of company C, 23d regiment, U. S. colored troops.

At the trial, exception was taken to the manner in which the jury was impanelled. It appears that twelve of the regular jurors were impanelled in another cause, and were out consulting upon their verdict. The defendant claimed the right, before the impanelling commenced, to have the whole array, consisting of twenty-six jurors, present and subject to his challenge. The court overruled the point, and directed the jurors then present to be called until the number was exhausted by being accepted, and by the challenges of the defendant. The court then directed the marshal to summon a sufficient number of talesmen, and the jury was completed

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and sworn to try the issue; to all of which the defendant, by his counsel, excepted.

The defendant represented in said claim that he was the sole and only heir of his brother, George Bowen, who enlisted and served in company C or G, 23d regiment U. S. colored troops, as Major Dabney. It is claimed on the part of defendant that there is a fatal variance between the claim and the allegation in the indictment setting out said application. The indictment alleges, in substance, that the claim presented was for arrears of pay and other allowances due one Major Dabney and his lawful heirs, who served as a private in company C, 23d regiment, United States colored troops, under the name of George Bowen. It will be seen on examination that the claim describes the deceased soldier as the brother of the defendant, serving in the company as Major Dabney; and the indictment describes the claim as setting up that he served under the name of George Bowen. The variance was deemed immaterial by the court below, and the objection was accordingly overruled and exception noted. The defendant offered to prove the declarations of John Bowen, the reputed father of the defendant, to the effect that he had a woman in Washington, not his wife, who had a son named George by him. The court refused to allow the statement to be given in evidence, on the ground that it was in no sense pertinent to the issue to prove that the reputed father of defendant had a son by a woman other than his wife, and that there was no law which authorized pedigree to be proved by hearsay testimony of that kind. This ruling was also objected to and an exception noted.

After the close of the testimony, the defendant's counsel asked the court to instruct the jury that previous good character of the accused is sufficient, when clearly proved, to create such doubt in the minds of the jury as will justify an acquittal, which the court refused to give in the words prayed, but did instruct the jury fully as to the weight to be given to evidence of previous good character. The defendant, by his counsel, excepted to such refusal to give the in-

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struction as prayed for. There were two or three other exceptions not insisted upon, and which are, consequently, omitted from this statement.

The defendant was convicted as charged in the indictment, and a motion for a new trial denied. The case is here on appeal.

H. H. Wells, U. S. Attorney, for the prosecution.

We say there was no error in the manner in which the jury was impanelled. The language of the statute seems decisive on this point.

It is made the duty of the court to summon talesmen whenever, for any cause, there is not a sufficient number of the regular panel out of which to form a trial jury. There were in this case more than enough jurors present until the number had been reduced by challenges on the part of the defendant, so that, as a matter of fact, the necessity for summoning talesmen was created solely by his challenges.

The real scope of this exception, however, is that the defendant has a right, before the impanelling of the jury is commenced, to have twenty-six jurors present subject to his challenge, so that if twelve jurors, or any smaller number of the regular panel in attendance upon the term, are out in another cause, all business of the court must stop until they agree or are discharged.

It goes still further. If, from any cause, one or any greater number of the jury are absent, sick, or for any other cause unable to attend, then no cause can be put on trial until the disabilities of such jurors are removed, or they have been discharged and other regular panel jurors have been summoned to supply their places.

That such is not the true intendment of the statute is very plain, not only because of the use of the expression in this section, "*by reason of challenge or otherwise*," but from the whole scope of the jury law.

A jury, before the commencement of each trial, is to be drawn from the box, "and the twenty-six persons whose

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names shall be drawn shall constitute the petit jury for that term." (Rev. Stat. D. C., sec. 858.)

If any of the persons so drawn shall have died or removed from the District, or become incapable of serving, the clerk shall draw from the box another name to serve in his stead. (Rev. Stat. D. C., sec. 859.)

Three exceptions were taken on the trial, which together embody substantially one and the same proposition, though stated in various forms, to wit: That under the allegations of the indictment it was incompetent to prove that Major Dabney was a member of company G, 23d regiment, United States colored troops.

All of these objections appear to us to rest upon a false construction put upon the indictment itself. That paper first alleges that the defendant Bowen presented a false claim, and states by way of recital what the claim was, and after that concludes as follows: "Which said claim was false, fictitious, and fraudulent in this," and thereupon enumerates the following particulars: "That the said John Bowen was not the brother of the said Major Dabney, alleged to have been called George Bowen," * * * "and was not entitled to recover any arrears of pay and other allowances due the said Major Dabney," * * * and "that said Major Dabney died leaving a father and a brother."

It will be remembered that the defendant, in his first claim, described Major Dabney as belonging to company C, while in the second or amended claim he was described as belonging to company C or G. Now, the indictment did not count at all as to any misstatement of the particular company, and it was not necessary for the purpose of proof to allege the fact that Major Dabney was a member of any company, because the falsity of the claim lay in the fact that he pretended and falsely stated that he was the brother and sole heir of George Bowen, *alias* Major Dabney, who served in company C or G; and, therefore, it was no error for the court to allow the muster rolls of both companies C and G to be received in evidence. They were proper evidence, be-

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ing original documents from the War Department, in every cause in which they might be relevant.

The roll of company C was introduced simply to show that no person of that name was borne on that roll, as charged in the defendant's original claim; nor were the facts as thus established by the roll of company C repugnant to any allegation in the indictment. Not only so, but if it had been averred that Major Dabney was a member of company C or G, and the fact in the examination proved to be otherwise, it would have been an immaterial defect, because the question as to which company the deceased belonged was immaterial and would be rejected as surplusage. As before stated, the allegation would have been only useful, and the proof was only material, for the purpose of identifying Major Dabney, deceased, so as to show that the defendant was not his brother.

The third exception relates to the instruction given and refused by the court on the subject of the weight that evidence of good character should have with the jury on the question of his guilt or innocence.

The court was asked to instruct the jury that "the fact of good character may be sufficient to create a doubt which will be sufficient to justify a verdict of acquittal," which the court refused to give in the words as prayed, but did instruct the jury that "evidence of good character is competent for the jury to consider, and in the absence of uncontradicted and conclusive proof of guilt, introduced on the part of the government, should weigh in favor of the defendant."

In the refusal to instruct as prayed, we submit that there was no error, but that the instructions given stated, with the utmost liberality to the defendant, the broadest rule as to the effect of such evidence.

On the trial, the defendant having offered to prove that John Bowen, the reputed father of the defendant, who was his illegitimate son, had long ago, and before the war, said that he had a woman in Washington who had a son George by him, the court refused to allow that statement to be given in evidence.

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In this ruling there was no error whatever, because the testimony was in no sense pertinent to the issue, inasmuch as it was already proven and never denied that Sophia Clements was the mother and John Bowen the father of the accused, and that Peter Dabney and Malinda Dabney were the father and mother of Major Dabney, the deceased soldier.

How could the fact, if properly proven, that John Bowen, deceased, had another illegitimate son by another woman, who was not the mother of the defendant John Bowen, tend to establish any issue involved in this case? Clearly it had no relation or reference to that subject, because the question was whether John Bowen was the brother of Major Dabney, the deceased soldier.

William A. Cook and J. S. Slater, for defendant.

The defendant was entitled to the array of the full panel of twenty-six, constituting the jury, as provided by section 856 of the Revised Statutes of the District of Columbia, from which to make his selections; and it was only after the full panel constituted as aforesaid had, in being arrayed, become exhausted, by "challenge or otherwise," that the court could legally direct talesmen to be summoned to complete it. The word "otherwise" cannot, by any proper construction, be taken to include an incomplete panel caused by the temporary engagement of some of the regularly summoned panel on a jury considering another cause.

There is a fatal variance between the allegations of the indictment concerning the service of the deceased soldier and the proof offered in support thereof, said allegations setting out that defendant claimed his brother was named "Major Dabney," and enlisted under the name of "George Bowen"; whereas the proof submitted by the government shows that defendant claimed to be the brother of George Bowen, *alias* Major Dabney, and who served, as was believed, under the name of Major Dabney in the 23d regiment, U. S. colored troops, &c. (See 1 Wheat. Crim. Law,

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592, &c.; 1 Greenleaf, 51; 56, 57, 60, 65; 10 Petersdorf Abridg't, 353, 354; 15 Petersdorf Abridg't, 200.)

In proving pedigree, the declarations of a deceased parent touching the existence and paternity of one of his alleged children are competent proof to be submitted to the jury, and especially so when such declarations are offered to be proved by a relative or member of the family of the deceased. It having been proved on the trial that the father of defendant was long since dead, and that during his life-time he made certain declarations concerning the existence of a person claimed by defendant as his brother George, the court erred in excluding the testimony of Sophia Clements, (formerly wife of defendant's deceased father,) Alfred Ross, and others of such declarations. The defendant was thus prevented from proving by competent testimony the truth of essential facts, viz., the existence of George Bowen, his brotherhood, &c. (1 Greenl. Ev., 103, and note 1, sec. 104; 1 Whart. Crim. Law, 666; Roscoe's Crim. Law, sec. 28, p. 27.)

Previous good character of the accused is sufficient, when clearly proved, to create such doubt in the minds of the jury as will justify an acquittal; and the court should have given the instruction as to this point in full, as prayed by defendant. (1 Whart. Crim. Law, 644; 3 Russ. Crimes, 300; 2 Brewster's Rep't, *Commonwealth v. Hart*, 546.)

Mr. Justice OLIN delivered the opinion of the court:

John Bowen was indicted under section 5438, p. 1060, for presenting a false claim against the United States. The particular crime alleged in the case was that the defendant, on the 9th day of December, 1874, presented to the Second Auditor of the Treasury a false claim for the back pay and bounty of a deceased soldier, one Major Dabney, to which back pay he, Bowen, claimed to be entitled as next of kin or heir at law. After carefully looking through the indictment we think it sufficient in law, and properly charges the offense mentioned in the statute. We see no error in the

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ruling of the court to which exceptions were taken on the trial.

The evidence recited in the bills of exceptions clearly shows that Bowen was a willing instrument in the attempt to perpetrate a gross fraud upon the Treasury, and it is only to be regretted that the party or parties that made use of him for that purpose do not stand in the same position that Bowen does by the verdict of a jury. The judgment in this case is affirmed, and the warden of the jail is directed to carry into execution the sentence of the Criminal Court.

GEORGE E. KIRK v. HENRIETTA H. COLE.

LAW.—Nos. 16,631 AND 16,781.

- I. This court will compel a justice of the peace, by mandamus, to issue a writ of restitution in execution of a judgment which he has rendered in a landlord and tenant proceeding, where no undertaking has been given by the defendant within the time prescribed by the rules of court in case of appeal.
- II. An appeal from a judgment rendered by a justice of the peace will be dismissed where no undertaking was given, as required by rules of court, within ten days after the rendition of the judgment; and the magistrate has no discretion which will authorize him to allow an appeal after the expiration of the prescribed period to which he must conform his practice in all cases of appeal.

STATEMENT OF THE CASE AND DECISION.

This was an action to recover possession of certain premises under the provisions of the act of Congress to regulate proceedings between landlords and tenants, instituted before B. W. Ferguson, a justice of the peace in and for the District of Columbia. Judgment was rendered therein in favor of the plaintiff on the 30th day of September, 1876, and on the 10th of October following, a writ of restitution was issued by the justice to execute the aforesaid judgment. On the 14th day of October, the defendant, Henrietta H. Cole, filed an

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appeal bond, and the writ was returned unexecuted. October 17, the plaintiff's attorney filed a written order with the justice, directing him to issue an *alias* writ of restitution, which he declined to do by reason of the appeal in the case which he had allowed, and the taking of a satisfactory appeal bond, upon which the papers in the case had been forwarded to the clerk of this court. On the 18th of October the plaintiff, upon his petition, procured a writ of mandamus from the chief justice of this court requiring the said justice of the peace to forthwith issue a writ of restitution in execution of the judgment aforesaid. A motion to quash this writ of mandamus was made at the special term and overruled, and an appeal was taken to the general term. The plaintiff also made a motion at the special term to dismiss the appeal taken by the defendant from the judgment of the justice of the peace to this court as aforesaid, for the following reasons, to wit: That the appeal bond was not filed within ten days after the judgment, as required by rule 105 of this court; that rules 107 and 116 were not complied with; that no bond has been filed as required by sections 689 and 1028 of the *Revised Statutes relating to this District*, and because the defendant has waived the right to appeal, &c. This motion to dismiss is, at the request of the parties, to be heard in general term in the first instance.

Rule 105, above referred to, requires that when an appeal from a justice of the peace is to operate as a supersedeas, an undertaking must be filed within six days, Sunday exclusive, and when not so to operate, within ten days after the rendition of the judgment complained of; and the preceding rule declares that no appeal shall be allowed from a judgment of a justice of the peace, unless the appellant enter into an undertaking to satisfy all intervening damages and costs arising on the appeal. In this connection reference is also made to section 689 of the statutes relative to this District, in the chapter entitled "Landlord and Tenant," which provides that in case of an appeal by a defendant, he shall, in addition to the bail required in other cases, recognize in a reasonable

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sum to the complainant, to be fixed by the justice, conditioned to pay all intervening damages to the leased property resulting from waste and intervening rent for the premises. The condition of the appeal bond does not provide for the damages contemplated by the rules of court.

The appeal from the order made at special term sustaining the mandamus and the motion to dismiss the appeal from the magistrate were argued together, and the court in general term were unanimously of opinion that the former ought to be affirmed, and that the motion to dismiss ought to be allowed, as no appeal bond whatever was given, as required by rules of court, within ten days after the rendition of the judgment; and there is no discretion to be exercised by the magistrate which authorizes him to take a bond after the expiration of the time prescribed by the rule to which he must conform his practice in all cases of appeal.

Ordered accordingly.

THE UNITED STATES v. WILLIAM H. OTTMAN.

AT LAW.—No. 14,481.

- I. An order quashing an attachment is appealable to the general term.
- II. The United States, when plaintiff in a civil action, is entitled to the writ of attachment, and is relieved by section 1001 of the Revised Statutes from giving the usual undertaking in such cases.

STATEMENT OF THE CASE AND DECISION.

Motion to quash an attachment which was issued at the instance of the United States against the goods, chattels, and credits of the defendant Ottman, which should be found in the District of Columbia, to the value of \$47,097.55, and, in addition thereto, the further sum of \$1,000 for costs and charges. On the 10th August, 1875, the marshal made return that he had attached the property described in the schedule annexed to the writ. The defendant, on the day

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following, moved to quash the attachment, and assigned as reasons therefor that the action was founded on a tort alleged to have been committed by Ottman, and for which he had been indicted in this court, and also for the reason that the United States cannot maintain an attachment, for it has not given and cannot give the bond required by the statute in such cases.

On July 12, 1876, the special term quashed the said writ of attachment, and the United States took an appeal to the general term. On the argument here it was contended that the decision of the court below quashing the attachment was not an appealable order. The statute upon which this question depends, provides that any party aggrieved by any order, judgment, or decree made or pronounced at any special term, may, if the same involves the merits of the action *or proceeding*, appeal therefrom, &c. (Sec. 772 Revised Statutes of District, p. 92.) Section 782 of the same statutes authorizes writs of attachment and garnishment, but requires the plaintiff therein to file his undertaking, with sufficient surety, to be approved by the clerk, to make good all costs and charges which the defendant may sustain by reason of the wrongful suing out of the attachment.

As to the objection that the United States did not and could not give the undertaking required upon the issuing of this writ, section 1001 of the Revised Statutes provides that whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a Circuit Court, either by the United States or by direction of any department of the government, no bond, obligation, or security shall be required from the United States, or any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs.

At the close of the argument, the court in general term expressed its opinion to be that the United States was entitled to the process of attachment, that the order appealed from went to the merits of the "proceeding," and that the United States was relieved from giving the usual undertaking in such

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case by the express language of the Revised Statutes last referred to. The order quashing the attachment was therefore reversed, and the case remanded to the special term for further proceedings.

H. H. Wells, District Attorney, for the United States.

Matt H. Carpenter, R. T. Merrick, and R. K. Elliot, for defendant.

OCEAN NATIONAL BANK v. FRANCIS F. BROWN.

EQUITY.—No. 2042.

When a trust deed is given to secure a debt for which seven promissory notes are passed, payable at various periods, and in case of default sale is to be made and the notes paid whether due or not, and the fund realized from the sale is insufficient to pay all the notes in full, the holders thereof are entitled to a *pro rata* distribution, without regard to the order in which the notes mature, upon their face.

STATEMENT OF THE CASE AND DECISION.

This cause was, on the 31st of October, 1876, by an order of this court, sitting in equity, certified to the general term, to be heard, in the first instance, on exceptions filed in that court to the report of the auditor, making a *pro rata* distribution of a fund realized from a sale under a deed of trust executed to secure seven promissory notes, made by the defendant Brown, each for \$2,000, and payable with interest from the 1st of February, 1868.

Two of these notes are owned and held by William Volens; two others, falling due later, are owned and held by James E. Morgan; one other owned by assignees of George Mattingly, and the remaining one is owned by a holder, name unknown.

The amount realized from the sale, made June 12, 1874, under the deed, was a sum insufficient to pay all of said notes *in full*. It is sought by Volens, holder of the two notes first

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falling due, to appropriate said sum, or as much thereof as may be sufficient, to the payment *in full* of the notes by him held, and to postpone to his own the payment of the other notes, held by various parties and subsequently falling due. On the contrary, it is contended by the other holders of said notes that a distribution of the proceeds of sale should be made among *all* the holders of the notes *pro rata*, without regard to the order in which they matured; and such was the report of the auditor, which in that respect is excepted to.

The trust deed recites a debt of \$14,000, for which the seven promissory notes were passed; that the deed is to secure the payment of these notes according to their true intent and meaning; that the grantor is to retain possession of the premises until default be made in the payment of all said notes, or any of them; that upon default being made in the payment of said notes, or any of them, sale may be made and the trustee shall pay whatever *may then remain unpaid of said notes*, and *the interest thereon, whether the same shall be due or not*.

The question is in regard to the time of payment of the notes, and the court were all of opinion that this must be controlled and determined by the provisions of the deed of trust executed to secure them. The notes were all given for the same debt, and the deed provides that upon default and sale the notes, although payable on their face at different times, mature together, whether due by their terms or not, the evident intention being that they were to be paid off at the same time and out of the same fund, by virtue of the provisions of the deed. So that, irrespective of the authorities where the point raised is not a matter of contract, it is clear from the deed itself in this case that a *pro rata* distribution of the proceeds of the sale among the holders of the notes was contemplated by the parties. The report of the auditor must be affirmed and the exception thereto overruled.

T. T. Crittenden, for Volens, cited 3 Leading Cases in Equity, 646-7; *State Bank v. Tweedy*, 8 Blackf., 447; *Stanley v. Beatty*, 4 Ind., 184; *U. S. Bank v. Covert*, 13 Ohio, 240.

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William W. Boarman and *N. F. Cleary*, for James E. Morgan, and *Edwards & Barnard*, for Mattingly, cited *Noyes v. Clark*, 7 Paige, 179; *Crane v. Ward*, Clarke Ch. R., (N. Y.,) 400; *Donley v. McKean*, 17 Serg. & Rawle, 400; Hancock's Appeal, 34 Penn. St., 155; 22 Id., 45; *Keyes v. Flood*, 21 Vt., 331, 550.

THOMAS A. BROWN v. FRANK H. FINLEY AND THE DISTRICT OF COLUMBIA.

AT LAW.—No. 15,618.

The District of Columbia is not subject to garnishment or attachment, on general principles of public policy, in respect of money due its contractors and officers.

STATEMENT OF THE CASE AND DECISION.

The plaintiff recovered a judgment against the defendant Finley for \$10,000. It is alleged that the District of Columbia is indebted to Finley in an amount larger than that of the judgment. This indebtedness was attached in the hands of the District by Brown under his judgment. The Commissioners of the District being served with the usual interrogatories, answered them, claiming that, on grounds of public policy, the District is, by law, exempt from process of attachment or garnishment. They also submitted a lengthy statement regarding the origin of the alleged indebtedness, and that the same was to be paid in bonds, not in money, and that any further issue of bonds is prohibited by legislation of Congress, and they claim that no judgment of condemnation should be made against the District. It is deemed unnecessary to set forth the return at length, as the court are of opinion that on general principles of public policy the District of Columbia is not subject to garnishment or attachment in respect of money due its contractors or officers.

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WYLIE, J., in addition to this principle, was of opinion that the answer of the Commissioners was a full defense to the attachment, and that there should for that reason be no judgment of condemnation against the District.

CARTTER, Ch. J., dissented.

Reginald Fendall, with whom was *Walter Davidge*, for plaintiff.

William Birney, for the District of Columbia, garnishee.

(See *Deer et al. v. Lubey and District of Columbia*, garnishee, 1 MacA., 187.)

CRESWELL ET AL., COMMISSIONERS OF FREEDMAN'S SAVINGS AND TRUST COMPANY, v. HARVEY KENNEDY, EXECUTOR.

EQUITY.—No. 4209.

Where an executor files an inventory, from which it appears that he has paid various debts amounting to nearly all the assets in his hands, and the complainant files his bill to enforce a sale of real estate to pay a debt due him from the estate largely exceeding the balance of assets so inventoried, and the executor interposes a plea averring that he has assets amply sufficient to pay all claims against the estate, and disputes the validity of complainant's debt, but avers his readiness to pay the same when its validity is established in a court of law, the court in equity, if satisfied that the debt is due, will decree the executor to pay the same without a resort to the law side of the court.

STATEMENT OF THE CASE AND DECISION.

The complainants in this cause exhibited their bill for the purpose of enforcing the sale of real estate, situated in the city of Washington, of which James C. Kennedy died seized, in order to pay the debts due from the estate. The bill alleges that the executor of the estate, Harvey Kennedy, has unlawfully dis-

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tributed the personal property by paying the claims of some of the creditors in full and leaving others, the complainants amongst them, entirely unpaid, and that the personal estate is insufficient to pay the debts due from the estate. The bill also prays for a discovery and an account from the executor.

To this bill the executor and the heirs and legatees interposed a plea, averring that the executor has in his hands assets belonging to the estate, amply sufficient to pay all claims against the estate which have been presented; that the executor disputes the justice and validity of the complainants' claim, and alleges his readiness to pay the said claim so soon as the complainants shall have established the validity thereof in a court of law.

A replication was filed in behalf of the complainants, and testimony was taken. Since the bill was filed the trustee of Jay Cooke & Co.'s estate has interposed in the case by petition, asserting that he holds an overdue note made by the testator, for the sum of \$3,500, which he seeks to collect.

From the bill and testimony in the case, it appears that James C. Kennedy, on the 27th day of March, 1872, made his promissory note for the sum of \$12,000, payable, with interest at the rate of ten per centum per annum, to his own order on demand, and delivered it to the Freedman's Savings and Trust Company. This note is unpaid.

On the 25th day of March, 1873, the testator died, leaving a will, made in the State of New York, and bearing date on the 10th day of February, 1857. The execution of this will appears to have been witnessed by only two witnesses.

Letters testamentary were issued to the defendant, Harvey Kennedy, on the estate of the deceased.

By the account of the executor, rendered to the Probate Court, and sworn to by the executor, on the 16th day of October, 1874, he charges himself with personal property amounting to the sum of \$31,794.63. But from this sum he deducts \$23,423.50 for furniture, stocks, &c., still on hand and unsold, leaving a balance of available funds amounting to \$8,373.11. With this available fund in hand the executor claims that he

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has disbursed for the estate the sum of \$27,014.70. If we add to this sum-total of debts the amount of the complainants' note and that of Cooke & Co.'s trustee, say \$20,000, the debts of the estate amount at least to the sum of \$47,014.70, besides other debts not noticed. This would leave a deficit of about \$14,000.

The act of the Maryland Assembly of 1789, which governs the conduct of executors, provides that "whenever personal property of any kind, or assets not mentioned in an inventory already made out, shall come to the possession or knowledge of an executor, * * * an account or inventory of the same shall be returned * * * within two calendar months from the time of the discovery."

The executor in this case has filed no additional inventory.

The evidence shows that the note upon which this action is based was presented to the executor soon after the letters testamentary were issued to him, and that it was also presented to his attorney. The records of the office of the register of wills show that the note was presented there, and "approved and passed" by the court on the 9th day of June, 1874.

The testimony settles the validity of the note and the fact that it has never been paid.

The appeal was taken by the executor from the decree requiring him to pay it. The court decided to affirm the decree under the peculiar circumstances of the case, saying that the executor had filed a sworn inventory, in the probate side of the court, showing a deficiency of assets. This was justifiable ground for filing the bill in this case. He now swears to a plea that he has amply sufficient to pay and discharge the claims of the complainant and others, without having filed any further inventory, or given any explanation of the discrepancy between the statement of his plea and the showing of the inventory referred to. We are satisfied the debt is due and owing, and we do not think the executor should be allowed any advantage from having misled the complainant,

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or that the latter should now be compelled to resort to the law side of the court for redress.

Decree affirmed.

Enoch Totten, for complainant.

Merrick & Morris, for defendants.

JAMES F. MEGUIRE v. QUINTON CORWINE, EXECUTOR,
AND DESSIE M. CORWINE, EXECUTRIX, OF RICHARD
M. CORWINE, DECEASED.

AT LAW.—No. 13,012.

- I. In an action upon a parol contract against executors, the plaintiff cannot be examined as a witness on his own behalf to prove such contract, or to testify to conversations with the deceased, unless called by the opposite party or by the court to be examined. (U. S. Rev. Stats., sec. 858.)
- II. A contract to pay plaintiff one-half of all fees in prize and bounty cases, in consideration of his assistance in securing the other contracting party to be appointed by the government special counsel therein, and also in consideration of plaintiff's assistance in arranging and carrying on such defenses, is illegal and void as against public policy.
- III. Where the plaintiff addressed two letters to the deceased, to which the latter made no reply, the jury are not to infer that the deceased admitted the facts stated in such letters.
- IV. Payment of part of a debt is not a satisfaction of the whole; and a receipt in full is no bar to a recovery of the balance, if the party giving it has been misled or deceived.
- V. But if the parties come together voluntarily, after the services have been rendered, and a dispute exists as to amounts due, and the plaintiff accepts and receives the sum of \$4,000 in full satisfaction, and discharge of all claims in pursuance of a settlement, and executes a receipt accordingly, he cannot afterwards maintain an action for a larger amount.

STATEMENT OF THE CASE.

The declaration contains three counts.

The first count alleges a contract by Richard M. Corwine, deceased, to pay to the plaintiff one-half of all the fees in the

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Farragut Prize and Bounty Cases, in consideration of the plaintiff's assistance in securing the said Corwine's appointment as special counsel in the said prize and bounty cases, and also in consideration of plaintiff's assistance in arranging and carrying on the defense in the said cases.

The second count alleges that the defendant, Richard M. Corwine, having been appointed special counsel in the two cases aforesaid, agreed with the plaintiff, in consideration of his assistance to be rendered in conducting the defense thereof and procuring the necessary testimony, to pay to the plaintiff one-half of all fees and compensation which he, the said defendant, should at any time receive in the cases aforesaid.

These two counts make the necessary allegations on the part of the plaintiff of the fulfillment by the plaintiff of his part of the contract, and the receipt of fees by the defendant to the amount of (\$25,950) twenty-five thousand nine hundred and fifty dollars, of which the plaintiff claims one-half.

The third count is for work and labor done, for money had and received by the defendant for the use of the plaintiff—the ordinary form of the common counts.

The defendant pleaded *nil debit* and *non-assumpsit*. Both the declaration of the plaintiff and the pleas of the defendant were supported by the usual affidavit.

At the time of trial the defendants amended the pleadings, and filed additional pleas of accord and satisfaction and payment.

Issue was taken on all the pleas. The action is against the executors of the deceased party, with whom the alleged contract was entered into; and on the trial of the case the plaintiff, who was the other party thereto, offered to prove the contract alleged in the declaration by his own testimony. An objection to this was sustained by the court; to which ruling the plaintiff excepted. The plaintiff then introduced several witnesses, whose testimony tended to prove that the plaintiff possessed important information in reference to the captures made by Farragut at New Orleans; that he had been a clerk in New

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Orleans, in the office of Colonel Holabird, chief quartermaster of the department of the gulf during the war, and had possession of Colonel Holabird's papers, from which he derived his information; that he made out lists and statements from said papers which were afterwards seen in the office of Richard M. Corwine, in his life-time, and that the latter acknowledged to several witnesses, in conversation, at different times, that he had an arrangement with the plaintiff by which he was to pay him one-half the fees he should receive in the Farragut cases, for his aid in getting him appointed as special counsel and for his assistance in procuring testimony and giving information for the management and defense in said cases. The plaintiff also introduced two letters, dated respectively March 4 and 10, 1874, which he had addressed to said Richard M. Corwine, one of which was delivered to his son, the now executor, and the other was delivered to the said Corwine in person, in which the amount of fees received are stated, and a demand is made for one-half of the balance, amounting to the sum of \$8,500.

It also appears from the deposition of E. L. Banfield, Solicitor of the Treasury of the United States, that the plaintiff communicated to him his information and suggested the name of said Corwine as a lawyer of experience and skill to take charge of the cases, and stated that if Corwine was employed by the government he should have the benefit of all the information he possessed. At the close of the plaintiff's testimony, the defendant read to the jury the plaintiff's receipt, in the following words:

"Received of R. M. Corwine four thousand dollars, which, with the sum heretofore paid me by him, is in full for all the services I rendered said Corwine in the way of collecting evidence and performing other duties for him, as the attorney of the United States, in the cases known as the Farragut prize and bounty cases, and I hereby acknowledge and certify that I have no other or further claim against said Corwine, and take the above sum in full satisfaction and discharge.

J. F. MEQUIRE.

JULY 31st, 1878."

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He also read from the records of this court entries in the Farragut cases, from which it appeared that the award therein was confirmed in the general term, April 19, 1873, and that the plaintiff was admitted to the bar September 23, 1872. The plaintiff in rebuttal called William Blackford, who testified that he was present when the receipt was given by the plaintiff. The money was paid to the plaintiff by Quinton Corwine, son of the deceased. The plaintiff offered to prove by this witness that the said Quinton stated that the sum there paid, together with a former payment, were one-half of all the fees received by the deceased in the Farragut cases. The testimony was excluded and an exception noted. The plaintiff offered to prove, by his own testimony, that the deceased had made a similar statement to him, and that it was in consequence of said statement, and in ignorance of the fact, that he gave the receipts, when a much larger sum had been received. There was the same objection, ruling, and exception as to the testimony of the previous witness. The evidence being closed, the court charged the jury that the contract set out in the first count of the declaration was illegal and void, and that the plaintiff could not recover on the second count unless the jury should find that the parties made another and distinct contract. To this charge the plaintiff excepted.

The plaintiff then asked the court to charge the jury as follows: "If the plaintiff caused to be presented to the testator the letters of the 4th and 10th of March, 1874, which have been read in evidence, and the testator made no reply to them, the jury may infer that the facts stated in those letters were admitted by the testator, and could not be denied by him. But such inference is a question for the jury alone, to be derived from all the circumstances of the case, and the conduct and language of the parties at the delivery of the said letters." The court refused to grant this prayer, and the plaintiff excepted to this ruling of the court.

The court granted the first and second prayers of the plaintiff, as follows, to which the defendants excepted:

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“1st. If any amount of money was due to the plaintiff from the testator, and the plaintiff agreed to accept a smaller sum in satisfaction of the whole, that agreement is no obstacle to the collection of the balance, unless the plaintiff received some other advantage sufficient to form a consideration for forbearing to collect the unpaid part of the debt. Payment of part of a debt is not a satisfaction of the whole, considered either as payment or as an accord and satisfaction.”

“2d. If the plaintiff was misled or deceived by the testator as to the amount of fees received by him, or if the testator concealed the said amount from the plaintiff, and the plaintiff acted in ignorance of the facts, and without a full knowledge of his rights, then plaintiff's receipt of July 31, 1873, is no bar to the recovery of the full amount which he was entitled to claim from the testator.”

The court granted the four following prayers asked for by the defendants, but as qualified by the first and second prayers granted to the plaintiff, to all of which the plaintiff excepted:

1st. If the jury shall find from the evidence that the plaintiff, in October, 1869, made an agreement with the testator, R. M. Corwine, deceased, that he would procure and induce the Secretary of the Treasury of the United States to retain and employ the said R. M. Corwine, as special counsel for the United States, to defend and protect the interests of the United States in two certain causes then pending in the Supreme Court of the District of Columbia, in admiralty, and commonly known as the *Farragut Prize Cases*, and in the event of such employment would assist Corwine to procure evidence and information to aid in the defense of such suits, and in consideration of the procuring of said Corwine to be so retained and employed, and of such assistance in procuring evidence, said Corwine agreed on his part that he would pay to said plaintiff one-half whatsoever fee or fees said Corwine might receive for his professional services in such cases, the verdict must be for the defendants. Such an agreement is void, because it is contrary to public policy; and the plaintiff

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cannot recover in any form of action for any services rendered or labor performed in pursuance thereof.

2d. If the jury find from the evidence that the plaintiff agreed to procure the appointment of the testator, R. M. Corwine, by the Secretary of the United States Treasury, as special counsel to defend and protect the interests of the United States in the *Farragut Prize Cases*, then pending in the Supreme Court of the District of Columbia, and that said Corwine on his part agreed, in consideration of such procurement, to pay the plaintiff one-half of all the fees he might receive in such cases, such contract was void, and the verdict must be for the defendant.

3d. If the jury shall find from the evidence that after the testator, R. M. Corwine, had been employed by the Secretary of the Treasury of the United States, as special counsel, to defend the United States in the *Farragut Prize Cases*, and after all the evidence therein had been taken and submitted, and decrees rendered in the Supreme Court of the District of Columbia, from which appeals had been taken to the Supreme Court of the United States, the plaintiff and said R. M. Corwine voluntarily came together and made a settlement for the work and labor and all the duties performed by the said plaintiff in and about said cases, in consequence of which settlement the said R. M. Corwine paid to said plaintiff in cash the sum of \$4,000, and that the plaintiff at the time of such payment signed a paper writing or receipt, and delivered the same to said Corwine, in the words and figures following, to wit, (*here refer to receipt as set forth in above,*) the verdict of the jury must be for the defendant.

4th. If the jury find from the evidence, after the said testator, R. M. Corwine, deceased, had been employed and for a long time engaged in defending the said *Farragut Prize Cases*, and after the plaintiff had performed and rendered all his services in procuring evidence and information, a dispute existed between the plaintiff and said R. M. Corwine as to the amount of compensation which said plaintiff was entitled to have from the said R. M. Corwine, and that said parties

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came together and agreed to and did settle the whole matter by the payment by said Corwine to the plaintiff of the sum of \$4,000, to be received by said plaintiff in full satisfaction and discharge of all claims for such services, and that said plaintiff actually received said sum of \$4,000 from said Corwine in pursuance of such settlement, the verdict must be for the defendant.

F. P. Stanton, for plaintiff.

The plaintiff was entitled to testify in his own behalf. (Rev. Stats., sec. 876.) The plaintiff excepted to the exclusion of Blackford's testimony. Quinton Corwine was the agent of his father when he paid the sum of \$4,000 to the plaintiff and took his receipt. What he said in the very act of making that payment was a part of the transactions, and was admissible against his principal. The representations then made induced the plaintiff to sign the receipt, and those representations were false. (1 Greenl. Ev., sec. 113; *The American Fur Co. v. The United States*, 2 Pet., 358.)

The plaintiff excepted when the court charged "that the contract set out in the first count of the declaration was illegal and void, and that the plaintiff could not recover on the second count unless the jury shall find that the parties made another and distinct contract." This charge is, in substance, repeated by the court in granting the first and second prayers of the defendant; to which, also, the plaintiff excepted.

The contract was not contrary to public policy. It was fair and honest on the part of the plaintiff, and does not come within the principle of any of the cases which have been cited to condemn it. The difference between all these cases and the one under consideration is briefly this: that the present plaintiff virtually stipulated with the government for the rendering of his own services in the defense of the Farragut cases. He was to assist Mr. Corwine, and to look to him alone for his compensation. There was no concealment or fraud. His proceedings were open and manly, and, so far from tending to injure the government, they actually pro-

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moted its interests. Mr. Corwine could not have claimed more than the government and the court were disposed to allow him as a just compensation for his services, including the assistance of the plaintiff; and it was not in the power of the plaintiff to influence this allowance in any way whatever. There was nothing in the nature of the contract, or in the character of the services stipulated, conflicting in the least with the public welfare.

The court below erred when it ruled that "the plaintiff could not recover unless the jury should find that the parties made another and a distinct contract." This instruction compelled the jury to find against the plaintiff; whereas the jury might well have inferred an implied contract to pay for the services of the plaintiff after the defendant had been retained in the cases. The defendant did, in fact, acknowledge his obligation and act upon it for some time afterwards.

Enoch Totten, for defendants.

This is a claim for compensation for services alleged to have been rendered by the plaintiff in procuring the employment of the late R. M. Corwine, in 1869, to conduct the defense of the *Farragut Prize Cases*, then pending in this court. The allegation is that the plaintiff had "the selection of counsel in said cases, the Treasury Department only restricting him to the selection of a man familiar with admiralty practice." Startling as this proposition seems to be, it is seriously insisted upon. The plaintiff was not the Secretary of the Treasury at the time he undertook to dispense the patronage of the executive power of the nation. If he had been, the criticism upon an agreement to dispose of such favors for a consideration ought to be severe. The contract based upon such a consideration cannot easily be supported. It is submitted that the contract alleged to exist here cannot be any more readily sustained. The law has been declared upon this subject, and it is to the effect that "all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice,

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or the appointment to public offices, * * * are void as against public policy."

The appointment mentioned was an appointment to a public office connected with the administration of justice—a position of the most delicate trust; and also, as appears from the record, of some profit. Such agreements are void. (*Norris v. Tool Co.*, 2 Wall., 45; *Clippinger v. Hepbough*, 5 W. & S., 315; *Harris v. Roof*, 10 Barb., 489; *Rose v. Truax*, 21 Barb., 361; *Marshall v. B. & O. R. R. Co.*, 16 How., 314.)

A contract which proceeded upon such a consideration, either in whole or in part, is wholly null and void. (*Trist v. Child*, 21 Wall., 441.)

The rejection of the plaintiff as a witness in his own behalf was correct. (Rev. Stats. D. C.)

The rejection of the prayer of the plaintiff's counsel relating to the letters was also correct.

The third and fourth prayers of the defendant granted by the court, which related to the settlement between the parties, truly express the law upon the subject-matter. (*Vedder v. Vedder*, 1 Denio, 260; *United States v. Childs*, 12 Wall., 242.)

Mr. Justice HUMPHREYS delivered the opinion of the court:

The first point made by plaintiff in error or appellant, who was plaintiff below, is that the court excluded the testimony of plaintiff, who offered himself as a witness. This suit is against the representatives of a deceased person. The witness, not being called by the opposite party, nor by the court, to testify, was clearly incompetent, and the ruling of the chief justice holding the Circuit Court was altogether right, and it would have been error to have held otherwise.

The second and third exceptions relate to the same principles—that is, testimony against the deceased, whose lips are closed in the solemn vault. This testimony was excluded as evidence, and we think it was properly excluded. The charge of the court as to the first count in the declaration was correct. Such an agreement as set forth, amounts to no contract to be enforced in a court.

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The charge as to the second count was correct.

The refusal to give in charge the first prayer of plaintiff was right. Plaintiff excepted to four prayers of defendant. The chief justice gave the charges as prayed, qualified by first and second prayers granted plaintiff. This was all correct, for these prayers were but a reiteration of the principles stated in the first charge.

If there was any error at all, it was in permitting the record to be incumbered with a repetition of what had been so emphatically and distinctly announced.

If counsel would take the trouble to examine *Johnson v. Jones*, 1 Black, 209, the teachings and injunctions of the Supreme Court of the United States might have some weight in the matter of exceptions.

We affirm the judgment of the Circuit Court.

WYLIE, J., concurs in the judgment, but is of opinion that the witness Blackford was improperly excluded from testifying.

JOHN F. HECHTMAN v. ALEXANDER SHARP.

AT LAW.—No. 13,776.

- I. The landlord's lien for rent is postponed to a mortgage or deed of trust existing upon the furniture of the tenant before it is moved upon the premises; but where that is displaced, his lien is good against all subsequent incumbrances.
- II. Where a note secured by a chattel mortgage is destroyed and a new note given in its stead, secured by a new deed upon the property to a different trustee, the lien of the new deed, if it is duly accepted and recorded, takes effect as to third persons from its date only, and these facts operate to let in the landlord's lien for rent in arrears.

STATEMENT OF THE CASE.

Replevin against defendant for wrongfully taking and detaining the plaintiff's goods and chattels of the value of \$500.

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The record discloses substantially the following case: On the 19th day of February, 1872, Olive Hechtman gave her promissory note for \$1,680, payable three years after date to John Hechtman, of Osseo, Minnesota, and at the same time executed a chattel mortgage upon the furniture in controversy to C. Storrs, in trust to secure such indebtedness. Afterwards, in 1874, the said Olive rented of William F. Holtzman a certain house on F street in this city, for which she agreed to pay \$150 per month. She moved into the premises, taking with her furniture embraced in the chattel mortgage. On the 12th day of March, 1875, she was in arrears of rent to the amount of \$325, and Holtzman, the landlord, in order to enforce his lien, issued a writ of attachment, by virtue of which the furniture was seized as the property of Olive W. Hechtman. Previously to the commencement of the attachment suit, and some days before the maturity of the note given to John Hechtman February 17, 1872, and while the furniture was on Holtzman's premises, Olive renewed the note and gave a new chattel mortgage, executed by herself and C. Storrs, trustee in the former deed, reciting the non-payment of the note and conveying the same property to the plaintiff to secure the payment of the new note. The last note and deed were executed with the consent of all the parties to the first. The action of replevin is brought against the marshal who executed the writ of attachment, by the new trustee in the second deed of trust. The counsel for plaintiff asked the court to instruct the jury that the mere change of trustee effected by the deed of February 15, 1875, by and with the consent of the *cestui que trust*, created no vacancy in the trusteeship which would let in the lien of the landlord upon the furniture for his rent; but the said justice refused so to instruct the jury, but did instruct the jury that the substitution of the new note for the old one, and the execution of the second deed, operated to postpone the lien of John Hechtman, the *cestui que trust*, and to let in the landlord's lien for rent; and further, that if they found from the evidence that the note secured by the first deed of trust was destroyed,

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and a new note given therefor and secured by a new deed upon the furniture to a different trustee, substituted for the first one, the lien of the new deed of trust, if duly accepted and recorded, took effect from its date only. Plaintiff's counsel excepted to the refusal of the court to instruct the jury as prayed, and also to the instructions given to the jury in the charge of the court as above. The verdict was in favor of the defendant, and the case is here on appeal of the plaintiff.

W. B. Webb and *B. H. Webb*, for plaintiff.

The renewal of the note by Olive Hechtman and the execution of the new deed of trust under date of February 15, 1875, did not operate as a payment of the old note. The burden of proof is upon the defendant to show that the renewal note was accepted as payment.

In *Peter v. Beverly*, 10 Peters, 567, the Supreme Court say: "The law on this subject is well settled, and the principle well and succinctly laid down in the case of *James v. Hackly*, 16 Johns., 277. It is," say the court, "a settled doctrine that the acceptance of a negotiable note for an antecedent debt will not extinguish such debt, unless it is expressly agreed that it is received as payment. * * * The evidence must be certainly so clear as to leave no reasonable doubt that such was the intention of the parties. And the rule to this extent is settled by the most unquestioned authority." (*Glenn v. Smith*, 2 Gill & Johns., 493.)

And further, in the case cited above from 10 Peters, the Supreme Court say that the substitution of notes, by way of renewal of notes already existing, operates to continue the debt, and is not in any manner to be considered as an extinguishment of the debt.

Where a new note is taken for the same debt mentioned in the old note, without an agreement to deliver up the old note, or that the new note shall be taken in satisfaction for the old note, the new note has ever been considered a mere collateral security, which does not affect or vary the rights or liabilities of the parties in any respect whatever. And it

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follows, that where such an agreement is not proved by those who rely upon it, it should be deemed not to exist. (*Wheeler v. Schroeder*, 4 Rhode Island, 383; *Berry v. Griffin*, 10 Md., 27; *Cunfield v. Ives*, 18 Pick., 255; 2 American Leading Cases, 270, 271.)

The deed of trust is, in effect and purpose, a mortgage; it is given to secure a loan, and creates an express lien upon the chattels in question. The landlord's lien is a tacit lien created by law; it attaches to the chattels of the tenant as soon as they are placed upon the demised premises, and continues as long as they remain there. But there is nothing in this lien which displaces the incumbrance created by a mortgage of said chattels existing at the time when they were placed upon the landlord's premises. (*Webb v. Sharp, supra.*)

Mr. Greenleaf says, in a note to Greenleaf's Cruise on Real Property, book II, p. 156, n. 1: "The mortgage being made to secure the payment of the *money* due, it follows that a change of the security, so long as the same debt remains, is no discharge of the mortgage. It has, therefore, been held, that though the former security be given up, and a new one given for the same debt, the mortgage still remains in force, even though the new security be of a higher nature than the old, or other names be added to the original obligation." (*Davis v. Maynard*, 9 Mass., 242; *Watkins v. Hill*, 8 Pick., 522; *Pomroy v. Rice*, 16 Pick., 22; *Binkerhoff v. Lansing*, 4 Johns. Ch., 73, 74; *Dunham v. Day*, 15 Johns. R., 555.)

The chattels in question can be relieved from the incumbrance created by the deed of trust of 17th February, 1872, in one of two ways only: there must be a formal release, or the debt secured by the deed must be extinguished. It is submitted that the deed to John F. Hechtman is not a release, and that the renewal of the note in question does not extinguish the debt; so that, at the time of the attachment taken out by Holtzman, the furniture taken was not subject to that writ under the terms of the act of February 22, 1867.

William Birney, for defendant.

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Mr. Justice MACARTHUR delivered the opinion of the court:

We think the ruling of the court below was right. There is no dispute about the right of a landlord to a lien upon his tenant's chattels unincumbered at the time when placed on the premises, or which, being incumbered at that time, may become free from incumbrance during the tenancy. The furniture was subject to a deed of trust when it was moved upon the premises, and the main question is as to the effect of the second deed upon the landlord's lien. It is true that a new note given for a former one will not extinguish the indebtedness unless it is received in payment; and if the transaction here were simply the renewal of the note, it would still be a charge under the deed upon the furniture. But this is not the view in which the exceptions are presented; for the jury were instructed that if they found from the evidence that the note secured by the first deed of trust was destroyed and a new note given therefor, secured by a new deed upon the furniture, to a different trustee substituted for the first one, the lien of the new deed of trust, if duly accepted and recorded, took effect from its date only, and that this state of facts would operate to postpone the lien of the *cestui que trust* and to let in the landlord's lien for rent. The case is not, therefore, that of a note given in renewal for the amount due upon a former one which was secured by a mortgage, but it is the case of a new note secured by an entirely different instrument vesting the title in another party. Whether the original debt was extinguished as between grantor and the *cestui que trust*, or whether there was an understanding between them that the new mortgage should stand as security, it cannot affect the rights of the landlord. His lien was undoubtedly postponed to the original security; but when that was removed, his lien was good against all subsequent incumbrances. The action is brought by the new trustee, who certainly can claim no priority except from the date of the deed under which he became a trustee. (See act of Congress of February 22, 1867; *Webb v. Sharp*, 18 Wall., 15.)

The judgment ought to be affirmed.

In the matter of the estate of Rebecca B. Afflick.

IN THE MATTER OF THE ESTATE OF REBECCA B. AFF-
LICK, A MINOR, DECEASED.

- I. The paternal grandfather of a deceased infant is nearer of kin by the law of this District than a maternal uncle, and is preferred as administrator, if he apply for the appointment.
- II. If the child is brought into this District from the State of Tennessee by a person who has not been appointed its guardian, the domicile of the child is not changed, and the legal residence is still that of its parents at the time of their death.
- III. The property of an intestate infant should be distributed according to the laws of its domicile at the time of its death.
- IV. The domicile of a deceased parent continues to be that of a surviving child who was between two and three years old at the time of such death, and the distribution of such infant's estate, who died shortly afterwards, will be according to the laws of such domicile.

The facts are stated in the opinion.

Leonard Myers and B. A. Lockwood, for David Afflick.

Edwards & Barnard, for William P. White.

Mr. Justice WYLIE delivered the opinion of the court:

The intestate died in the District on the 9th of February, 1876, at the age of about thirty months.

Her father and mother had died at Memphis, Tennessee, which was the place of their domicile in 1873, intestate, leaving this child sole heir and next of kin to each of them. The child was thus left among strangers, and in a helpless condition.

On hearing of the death of its parents, Mr. William P. White, an uncle of the child on the side of its mother, and a citizen of the State of New Jersey, but a resident of this District, hastened to Memphis, and thence returned, bringing her with him to his home, and soon afterwards was appointed guardian by decree of court in this District.

So soon as these facts became known to David Afflick, who was and still is a citizen of Pennsylvania, and the paternal grandfather of the child, he came to this city and made ap-

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plication to the court to have the appointment of Mr. White revoked on the ground that the paternal grandfather was nearer of kin to the infant than the maternal uncle, and because the court here had no jurisdiction to appoint a guardian under the circumstances; but this application was refused by the court, and Mr. White continued to act as guardian till the death of the child as above stated.

On the death of its parents, this child inherited from them a considerable amount of property, both real and personal, all having its *situs* in Tennessee. Of this property Mr. White, under color of his authority as guardian, succeeded in collecting about \$9,000 in money, which is now in his hands, and there yet remains a considerable amount of lands and movable assets in that State, now the property of the heirs or next of kin of this deceased child.

The grandfather, Davis Afflick, has already procured letters of administration as to the personal estate in Tennessee, and is now applying here for similar authority, with a view of collecting from Mr. White the money which the latter obtained in Tennessee under color of his authority as guardian of the child in its life-time, appointed by the court here.

Mr. White is also applying for the same appointment, and the first question to be decided is, which of them, under our laws, has the better right—Mr. White, who was the maternal uncle, or Mr. Afflick, who was the paternal grandfather, of the deceased infant.

Under our testamentary act the appointment must be given to him who is next of kin, and who that is must be determined according to the rule of the civil, and not according to that of the common law. According to this rule the grandfather is in the second degree and the uncle in the third degree of kinship to the intestate; and yet according to this very act the grandfather must be postponed to the uncle in the distribution of the estate. He is to be preferred as administrator, but cannot share in the distribution. There may be a good reason for this separation between duty and privilege; but the case is different under the English statute of

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Charles II, and, I believe, in the laws of the States of this country.

There is a difference, also, as to the rules that control the descent of real from those which control the distribution of personal estate; but as to that, it is not now necessary to speak.

Thus far I have regarded the question under consideration as it might be affected by the laws in force in this District. But the case also presents the question as to the effect which the laws of Tennessee may have in the matter of the distribution of the personal estate lately the property of this intestate child.

If, at the time of its death, the domicile of the child was in Tennessee, this property should be distributed according to the laws of Tennessee, and by these laws the grandfather would be entitled to a share in the distribution. If, on the other hand, the domicile of the infant at the time of her decease was in this District, he would be excluded from such participation, although preferred as administrator; and this is a question of importance, and must be met, if not now, yet upon the settlement of the administration account.

It is certain that the domicile of the deceased parent continues to be that of the surviving child who was an infant at the time and at the home of the parent; nor can such infant afterwards change its own domicile, for want of legal capacity to effect such change. The domicile of the deceased parent continues to be the domicile of the infant, so that in case of the latter's death the distribution of his estate will be according to the laws of the parent's domicile, notwithstanding the child, at the time of his death, may have had his residence in another country, and have abandoned his father's domicile with full purpose never to return.

In the present case, therefore, the money which the administrator of the estate may collect in this District must be distributed according to the laws of Tennessee, and not according to our laws, unless the court should hold that the removal of the child into this jurisdiction by Mr. White and his sub-

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sequent appointment as guardian were sufficient to effect a change of domicil for the infant.

I am of opinion that the ward's domicil may be changed by his guardian, as it could have been by the parent. But in this case the change of domicil was not made by the guardian of the infant, but by Mr. White, who was not her guardian at that time; and it may well be doubted whether, under our law, there was jurisdiction for his appointment as guardian. The act of Congress confers jurisdiction upon the court to appoint a guardian in two cases: first, when the infant is the owner of property lying within this District; second, when both the person of the infant and its residence are within the District. In this law it seems to me that the term "residence" is used in the sense of domicil. If that be so, the residence which was necessary to authorize the appointment of Mr. White as guardian did not exist at the date of his appointment, for the residence of the child was still that of its parents at the time of their decease—not changed by the child, for want of capacity—not changed by White, for he was not its guardian.

Mr. Justice OLIN delivered a dissenting opinion:

This cause comes here on an appeal from an order passed on May 19, 1876, by the justice holding a special term, probate jurisdiction, granting letters of administration to one Davis Afflick on the personal estate of Rebecca B. Afflick, an infant.

The undisputed facts in the case, as disclosed by the record, are these:

This child died in the District of Columbia, on the 9th day of February, 1876, about three years of age, while in the custody and care of its uncle and guardian, William P. White, a citizen of the United States, then and now a resident of this city, and with whom it had lived since it was two and a half months old. White was appointed the guardian of the child by this court on the 19th day of August, 1873, and had in his

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possession some \$9,000 in money and other personal effects belonging to the child when it died.

On the 15th of February, 1876, White filed a petition, under oath, in this court, stating, in substance, that the child died in this city; that it had been a resident thereof since it was two and a half months old; that at the time of its death it was domiciled here; that it left personal property within the jurisdiction of this court; that he was entitled to administer on its estate, and asked that letters of administration be granted to him.

Upon the filing of this petition the court ordered a notice to be published in one of the daily papers of this city that all parties interested appear on the 11th of March following to show cause against the grant of letters to White as prayed. This order was duly published. Nothing appears to have been done in the cause until the 24th of March, when Davis Afflick appeared and filed a counter-petition, alleging the death of the child as before stated; that its true domicile was in Memphis, Tennessee; that by the laws of Tennessee he was the next of kin and entitled to letters of administration, and asked that letters on the child's estate issue to him. There is nothing in the record tending to show that any notice whatever was given to White, or to any one concerned, of the filing of Afflick's petition, or that any citation or process was issued against him or the other relatives of the child.

On March 27, three days after the filing of Afflick's petition; the justice passed an order appointing Afflick the administrator of the estate. On the 15th of April following White filed a petition, under oath, for a rehearing of his application for letters of administration on the child's estate, and of the cause whereby letters were granted to Afflick, stating, in substance, the following reasons, viz.:

First. Because the order appointing Afflick administrator was improvidently granted.

Second. Because said appointment was contrary to law and the practice regulating the appointment of administra-

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tors as prescribed by the order of court passed at a special term, probate jurisdiction, on the 20th January, 1874.

Third. The order of appointment was under a misapprehension of the law governing the appointment of administrators in the District of Columbia.

Fourth. Because he had no notice of the filing of Afflick's petition; that he was ignorant of its existence or contents until April 12, nearly a month after the grant of letters to Afflick; that the application of Afflick should not have been heard or considered until after due notice.

Fifth. Because the case was not in a condition to be heard when the order appointing Afflick was passed. No answers had been filed to either of the petitions; no issue presented which the court could intelligently determine, and no testimony taken, or even offered, to sustain or disprove the allegations contained in the respective petitions, which allegations were at variance with each other. In this petition for a rehearing White further stated that, if permitted to do so, he could and would show good and sufficient cause against the grant of letters to Afflick; that the material allegations in Afflick's petition were untrue, and that the latter was not a fit or proper person to be appointed administrator on this estate.

Due notice of the filing of this petition for a rehearing and a copy thereof were served on Afflick's attorney, and on the day fixed for calling it up both parties appeared in court by their attorneys, and, after argument, the following order was passed:

"In the Supreme Court of the District of Columbia, special term, probate jurisdiction.

"In the matter of the estate of Rebecca B. Afflick, deceased.

"The petition of William P. White for a rehearing in this cause, as filed herein on the 15th instant, coming on to be heard, both parties, to wit, the said William P. White and Davis Afflick, being represented in court by their respective solicitors, and the court having granted a rehearing as prayed,

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and the cause being again heard and submitted, and it appearing to the court that the decree passed in this cause, on the 27th day of March last past, appointing the said Davis Afflick administrator on the personal estate of the said Rebecca B. Afflick, deceased, was improvidently granted and passed, the cause not being in proper condition for hearing: It is, this 18th day of April, A. D. 1876, ordered, adjudged, and decreed that the said decree of March 27 last appointing said Davis Afflick administrator as aforesaid be, and the same is hereby, set aside, and said appointment be, and the same is hereby, revoked and held for naught.

“And it is further ordered that the said William P. White and the said Davis Afflick each have fifteen days from the date of this decree within which to amend their respective petitions as they may be advised; and upon the coming in of such amendments, or at the end of such term, if no amendments be filed, to cause to proceed according to the forms and practice prescribed by this court and the law governing the same.

“By the court :

A. W.”

On the 2d day of March following, and within the period allowed the parties to amend their respective petitions, White filed an amended petition, under oath, alleging that he was a citizen of the United States, and a resident of and domiciled in the city of Washington, in this District, and had so resided and been domiciled for more than five years. On the 6th of the same month Afflick filed an answer to White's amended petition, admitting the facts alleged therein to be true.

Five days after, White moved the court for leave to file an answer to Afflick's petition for letters on the estate, and for an order on the latter to answer his (White's) petition for such letters, and gave notice that on the following Thursday, the 11th of May, he would call it up for hearing. Nothing was done in the cause until the 18th of May, when Afflick filed a copy of letters on the child's property in Tennessee, granted to him by the Probate Court of Shelby county, in that State. On the day following the court below passed an

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order overruling White's motion for leave to answer, &c., filed on the 18th of May, refused White's application for letters, and ordered that the same issue to Afflick. From this order White appealed to this court.

The first objection raised by the counsel for White is, that the petition of Afflick does not present a case giving the Probate Court jurisdiction to grant letters to him, because it does not allege that he is a citizen of the United States.

No such allegation appears, and Afflick's counsel admitted at the hearing that there is no such allegation in his client's application, contending that it was immaterial. In this, however, I differ. I consider the omission of this allegation fatal to Afflick's claim to letters.

By the first section of the fifth sub-chapter of the testamentary act of 1798, it is expressly declared that no letters of administration shall be granted to a person who is not a citizen of the United States. This is a condition precedent. To entitle a person to letters he must affirmatively bring himself within the requirements of the law. The allegation of citizenship is as essential to jurisdiction to grant letters to the applicant, as that there is property of the defendant within the jurisdiction of the court. The court cannot presume citizenship, or any other jurisdictional fact.

"Courts of probate have a special and limited jurisdiction. Their proceedings cannot be sustained by presumption, and their records must show explicit finding of all necessary jurisdictional facts." (*Potioni's Appeal*, 31 Conn., 382; *Pette v. Wilmouth*, 5 Allen, 144; *Brodess v. Thompson*, 2 Har. & Gill, 120; *Yeaton v. Lynn*, 5 Peters, 228; Maryland act of 1778, ch. 101, sub-ch. 15, sec. 20.)

The mere filing of a copy of letters of administration granted to Afflick by the Probate Court of Shelby county, Tennessee, was not sufficient to give this court jurisdiction to grant letters on the property of the deceased within the District of Columbia. Our testamentary system expressly declares to whom letters shall be granted. A foreign administrator, as such, acquires no statutory right or prefer-

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ence to letters here. It is the established rule and the policy of the law to grant letters wherever the personal estate may be, so that the court, by taking jurisdiction of the fund, may protect the rights of creditors and others within its jurisdiction. This was the decision of this court in the Ames case, decided January Term, 1872.

The second objection is, that the order of April 18, 1876, revoking the order whereby letters were first granted Afflick, was final; and if aggrieved, his remedy was by appeal; or by petition in the nature of a bill of review. On this point I express no opinion; my conclusions on the other objections to the order appealed from obviate any necessity of determining this. The third objection raised on behalf of White is, that the cause was not in a condition to be heard when the order appealed from was passed.

It was further contended at the argument, in behalf of White, that the order overruling his motion for leave to file an answer to Afflick's petition, and that the latter be required to answer his (White's) petition, in effect deprived him of a hearing, and denied to him a right which, under the law, the court could not properly refuse. I am of opinion that these objections are well founded, and should be sustained.

Here are rival claims for letters of administration on a large and valuable estate. Afflick alleges in his petition that the child's domicile at its death was in the State of Tennessee; White says it was in the District of Columbia. Both petitioners are under oath. No evidence whatever has been taken in the cause, and there is nothing in the record to aid the court in determining which is the true domicile of the deceased. It does appear, however, that the child was an orphan, that it died in this city in the care and custody of White, its lawfully appointed guardian, and that it had lived here with him some two or three years prior to its death. These are strong circumstances in favor of domicile here—sufficient, at least, to require proof that it was elsewhere. The proceedings in the court below, on White's application, appear to have been regularly conducted, and every step taken in the

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cause in his behalf was upon due notice to Afflick or his counsel; while in respect of Afflick's petition and his proceedings thereunder, a far different course seems to have been pursued. White filed his petition on February 15, 1876. Upon its filing the court ordered a notice to be published in one of the daily newspapers of the city of Washington, warning all parties interested to appear on the 11th March following, to show cause why letters should not issue to him. This order was duly published. No objections were made or filed within the time limited. On the 24th of March, thirteen days after the time had expired to file objections, Afflick filed a counter-petition; no notice whatever of this petition was served on White or any one concerned in the estate; no order of publication passed or citation issued as required by the order of the court then in force; and, in the absence of all these essential preliminaries, the court, three days after Afflick's petition, without proof or any other circumstances before it, outside of the allegations in the respective petitions, passed an order granting letters to Afflick.

A short time after this order was passed, White filed a petition for a rehearing and review, for the reasons hereinbefore stated. At the hearing of this petition both parties appeared in court, and, after argument, the court passed the order of April 18, 1876, revoking the letters previously granted to Afflick. In this same order each party was allowed fifteen days within which to amend their respective petitions, and upon the coming in of the amendments, or at the expiration of the time limited, if no amendments be filed, the cause to proceed according to the forms and practice prescribed by the court and the law governing the same. This order was eminently proper under the circumstances. It left the cause precisely as if no letters had been granted to Afflick. In passing it the court must have been satisfied that certain necessary allegations were omitted from the original petitions and should be supplied; else, why the provision for amendments? The court did not intimate what amendments were necessary. It does appear, however, that there is no aver-

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ment of citizenship in either petition. On May 2, 1876, and within the period limited, White amended his petition by alleging, under oath, that he was a citizen of the United States. Afflick did not, but admitted in his answer, filed May 6, to the amended petition of White, that the latter was a citizen.

The time limited by the order for filing amendments expired May 3, 1876. On the 8th following, after a lapse of but five days, White filed a motion for leave to file an answer to Afflick's petition, and for an order on the latter to answer the petition filed by him (White). A copy of the motion was served on the solicitor for Afflick on the same day. At the hearing, to wit, on the 19th of the same month, this motion was overruled; and by the same order, and without any other or further steps taken in the cause, save the filing of a copy of letters issued to Afflick on the child's property in Tennessee, without notice, and with the allegation in the record under oath that the material facts stated in Afflick's petition were untrue, and that he was not a fit or proper person to be appointed administrator, the court again appointed Afflick administrator.

I think this order was wholly unjustified and improper, and that the denial to White of an opportunity to answer his opponent's petition, and of an order on the latter to answer his, was contrary to the provisions of the testamentary act of 1798, and the practice of all well-regulated tribunals in the administration of justice. White was not guilty of any laches or neglect, for he made this motion five days after the expiration of the time limited for filing amendments to the petitions. He moved promptly and without delay.

At the hearing, counsel for Afflick contended that there is no provision in the law regulating proceedings in the Probate Court in litigated or contested cases. I cannot concede this. The mode of procedure in that tribunal, when there is a contest, is analogous to that of a court of chancery. The sixteenth section of the fifteenth sub-chapter of the act of 1798 expressly declares that whenever either of the parties having

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a contest in the Orphans' Court shall require, the said court may (shall) direct a plenary proceeding by bill or petition, to which there shall be an answer on oath, and if the party refuse to answer on oath to any matter alleged in the bill or petition, and proper for the court to decide upon, the party may be attached, &c. And the seventeenth section of the same sub-chapter provides that on such plenary proceeding all the depositions shall be taken in writing and recorded; and in case either party shall require, the court shall direct an issue or issues to be made up and sent to a court of law for trial; thereby expressly reserving to all litigants in this court the constitutional right of trial by jury.

The Court of Appeals of Maryland hold, in the case of *Barrol et al. v. Reuling*, 5 H. & J., 175, that either party has a right at any stage of the proceedings, prior to a final decision, to have a plenary proceeding and an issue sent to a court of law for trial. A plenary proceeding had been instituted in this cause, for both parties had filed petitions. The court, in passing the order of April 18, directing, after the filing of amendments, that the cause proceed according to law, must have had this provision of the act of 1798, governing contested cases, before it. Counsel, in moving the court for an order on Afflick to answer White's petition, was proceeding under it. Under the plain language of the law, White should have been allowed to answer Afflick's petition. Why he was refused, the record does not show.

If the position assumed by Afflick's counsel be correct, a very deplorable state of affairs must necessarily exist in determining the rights of parties in this tribunal. If his theory be true, the court is bound to adjudicate the rights of contending parties upon the facts disclosed by their respective petitions, no matter how much at variance they may be. This was never contemplated, and is not the law. In all controverted jurisdictional questions of fact either party has a right to be heard, and he cannot be deprived of his right to an answer from his opponent, and to an issue sent to a court of law for trial by jury. Afflick's counsel further claimed in

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the argument that the fund was not properly within the jurisdiction of this court. This is immaterial. That the fund is here in the custody of an officer of this court is not denied. If he has no right to it, the remedy of the party claiming it is elsewhere. If no personal property or effects of this deceased are in this District, the court is without jurisdiction to grant letters, and both petitions should be dismissed. He further contended that, even admitting the child was domiciled at its death in the District, the grandfather was entitled to letters under the law as the next of kin to the deceased, and relies on the thirteenth section of the fifth sub-chapter of the act of 1798 to support this position. It is not denied that the degrees of kindred to the intestate must be computed according to the canon law under this act, which would prefer the grandfather to the uncle. But there is another provision in the law, which does not admit of the construction placed upon the act by Afflick's counsel. The eighteenth section of the sub-chapter declares: "*None shall be preferred in the ascending line beyond a father or mother, or in the descending line below a grandchild.*" Afflick is the grandfather, and is not preferred. Beyond a parent or below a grandchild, the court exercises a discretion in the appointment, with the exception that males are preferred to females, in equal degree. The reason for thus vesting a discretionary power in the court beyond a parent and below a grandchild, is made clear when we consider that in the distribution of an intestate's estate in this District an uncle or aunt is preferred to a grandparent; and it is the policy of the law, and so provided by express enactment in our testamentary system, to grant letters to the person, or one or more of a class of persons, who would be entitled as distributees to the property. To illustrate: A person dies domiciled here, leaving a large amount of money in bank; his nearest relatives are uncle and grandfather; the latter is the nearest of kin, but, in the distribution, the uncle under the law gets the property. If the position of the counsel for Afflick be correct, the grandfather is entitled to administer, while the uncle, the only person interested in or

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entitled to the money, is to quietly stand by, await the period provided by law for the settlement of the estate, run the risk of a devastavit, and be compelled, in the shape of a commission of not less than five per cent., to pay a stranger for simply receiving the money from the bank and paying it over. This is too absurd, was never contemplated, and is not the law. The parties being beyond the degree expressly preferred, the court would appoint the uncle, in the exercise of a sound discretion under the law.

Large interests are involved in this case. I feel that it is the duty of the court to give each party a fair opportunity to be heard. I am gratified in coming to the conclusion herein expressed by the assurance that no serious injury can result to Afflick in reversing the order appealed from. The fund is in the custody of an officer of this court under bond; and, moreover, ample provision is made by law for the protection of the estate pending the contest over the grant of letters, by appointing a collector to take charge of and preserve the fund.

I express no opinion as to the true domicile of this child at its death; the cause in its present condition does not justify a decision on this point. The order appealed from should be reversed, and the cause remanded to the justice holding the special term, probate jurisdiction, with instructions to require answers to be filed to the respective petitions, with liberty to Afflick to amend his petition as he may be advised, within such time as the justice may require, and that the cause thereafter proceed according to law.

Brooks v. Francis.

JOHN H. BROOKS v. RICHARD FRANCIS, JULIA A. RODGERS, GEORGE A. RODGERS, ET AL.

EQUITY.—No. 4314.

- I. The testimony of a married woman as to statements made to her by the husband, concerning his pedigree, should be excluded, although he is dead at the time of the trial.
- II. A widow whose husband was illegitimate is his sole heir at law, in case there are no children by the marriage.

STATEMENT OF THE CASE.

The bill herein was filed for settlement of title and reformation of deeds.

It set forth that one Correll Rodgers, being the owner of certain premises in the city of Washington, borrowed of the defendant Richard Francis \$700, agreeing and intending to secure the repayment of the loan by a deed of trust on said premises, and accordingly executed an instrument for divers reasons defective and void; that afterwards Correll died, leaving the defendant Julia his widow, the defendants George *et al.* his next of kin and heirs at law, and the loan unpaid; that when the loan became payable, Richard, the lender, bought the property, and subsequently sold it to the plaintiff for \$5,000, and was now seeking to compel the full payment thereof, notwithstanding that all the deeds were irregular, defective, and void; and the plaintiff prayed, &c.

To this bill the defendant Julia appeared, and answered the same under oath, admitting the material averments of the bill, and saying that the defendants George *et al.* were the heirs and next of kin of her late husband, while she was his widow, but that the property in question had been bought with her money, and that she was, therefore, in equity, entitled to the proceeds thereof, after satisfying the debt of Richard Francis.

The defendants Richard Francis, Elias Francis, and James H. Smith also answered under oath, admitting that the de-

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fendants George *et al.* were the heirs and next of kin of the late Correll Rodgers, deceased.

More than a month afterwards, however, the said defendants again came into court and filed amended answer, alleging that they were informed and believed that the said George *et al.* were the children of another child of the mother of Correll, and that such mother was never lawfully married to any person.

The defendants George *et al.* appearing to the bill, answered, averring that they were the sole heirs and next of kin of the said Correll Rodgers, deceased; admitting that it was the intention of their said uncle to secure the payment of his loan from Richard Francis upon the property in question; that they were willing that said Richard should be repaid, but that they had succeeded as heirs to the estate of their said uncle, and were of right entitled to have the amount of the lien determined, and then to redeem the property from the incumbrance, or to receive the avails, upon its sale, after discharge of the debt and satisfaction of their aunt's dower.

To the same effect these defendants filed their cross-bill, alleging their sole heirship to Correll, deceased; that their father was William Rodgers, the only brother of said Correll; that at his death Correll was the owner of the property mentioned, seized and possessed thereof in fee; that, subject to admeasurement of widow's dower, they were entitled to the legal estate and to possession of the same; that they were not fully informed as to the equitable rights of the defendant Richard Francis. Wherefore they require them to be fully proven, and then that they should be allowed to discharge such debt after its determination, and to redeem the property. They prayed an accounting and redemption.

To this cross-bill answer was made to the same effect as the amended answers before set forth, and thereupon issues were duly joined.

There was also evidence tending to prove that the property in controversy was purchased with the funds of a woman, Julia Ann Rodgers, and was conveyed to her husband, Cor-

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rell Rodgers, a mulatto; that Correll Rodgers died leaving no children surviving him, and that in consequence of his illegitimacy his widow became sole heir to inherit the property purchased with her own money. It seems that Correll Rodgers was a slave and the son of his master, Augustus Rodgers, by a colored woman, belonging to his master, named Keziah; that he was born in Virginia.

The defendants, who have filed a cross-bill, claim to be children of William Rodgers, a reputed brother of Correll, and hence the heirs of Correll.

It appears from the record that this William Rodgers was a mulatto, and the son of a white man; whether by the same woman or not whence Correll sprang, is left in doubt. There is testimony to show that he was the son of a colored woman named Betsy. There is no proof whatever of any marriage between Correll's mother and his father. Indeed, by the laws of Virginia such a marriage would have been null and void. (Va. Code, 529, chap. 109; 5 Call, 148.)

The deposition for the respective parties having been taken, and the widow of Correll Rodgers, deceased, having therein testified, on her own behalf, in support of her claim to be the sole heir of her husband, that during their married life her late husband had told her that his mother was never married, the aforesaid defendants, plaintiffs in the cross-bill, duly excepted to such testimony.

But the court, on the hearing of the cause, overruled the several exceptions taken, and decreed that Correll Rodgers was illegitimate, and his said widow accordingly his sole heir at law. Whereupon appeal.

Francis Miller, for complainant.

George F. Appleby, for Richard Francis.

If a witness be cross-examined, with a knowledge by the party cross-examining of an objection to his competency, it is a waiver of the objection. (*Flagg v. Mann*, 2 Sumner, 489; *Glass v. Stinson*, Id., 605.) In this case it was known to the

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party cross-examining, as appears by the record, that Julia Ann Rodgers was the widow of Correll Rodgers. This court had decided in *Utermehle v. Utermehle*, and in other cases, that a wife not a party to the record, although directly interested in the event of the suit, and although supposed to be *sub protestate viri*, is a competent witness. *A fortiori* is a widow who is a party to the record a competent witness. The act of Congress expressly makes her competent. (Rev. Stats. Dist. of Col., secs. 876, 277.)

The alleged error in the ruling of the court below is, that a widow cannot testify as to what her husband told her during their married life concerning his pedigree.

This very point has been decided by the United States Supreme Court, and such testimony was by that court declared to be legal evidence. (*Elliot v. Piersol*, 1 Peters, 328.)

This decision was made by the act of Congress cited *supra*, but in view of that act it could not be otherwise.

The case, instead of showing any merits, reveals a shameless attempt to plunder the property and estate of a poor colored woman, who, in order to purchase it, sold her own patrimony in Virginia—an attempt made by certain strangers, claiming now to be heirs, whom in his life-time her husband never regarded or recognized as relatives, and upon whose reputed father, through whom the alleged relationship is traced, Nature herself affixed the stamp of bastardy.

Mr. Justice HUMPHREYS delivered the opinion of the court:
We affirm the decree of the chancellor in this cause.

We think that his decree fully met the equities, as growing out of all the rules for the government and determination of rights according to law.

For the purpose of keeping distinct and distinguishable the complicated matters of marital rights growing out of the rebellion, and the consequent capacity of alleged husband and wife, we will exclude the testimony of alleged wife; yet we find enough testimony to sustain the claim of the person

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in possession, claiming to be wife, to exclude the alleged heir at law, apart from the possession.

On the authority of *Nelson et al. v. Woodruff et al.*, 1 Black S. C., 156, we would exclude the testimony of Julia Ann Rodgers; then we say that the same ideas which could lead the mind to the conclusion that Correll Rodgers had two brothers who could inherit from him, will, according to the evidence, establish that he had a wife who succeeds to his estate.

Now, then, exclude Julia Ann; yet she has possession, and that possession by virtue of claiming to be wife. What matters whether she was wife of one incapable of holding property? The claimants are in no better condition. If she was the female associate of the man, in the intimate relation ordinarily existing between man and wife, then, whether slave or free, she is, at least, equal to those who occupy a correlative attitude as to freedom or slavery.

She is now in possession; she was a comrade of a man whom she called her husband; the two lived together as man and wife, though the moral or legal bonds of slavery may have been around them; the property in question was the property of the man she served as actual wife.

She is, in our view, entitled to it as the widow.

The decree is affirmed.

DIMON HUBBARD v. JAMES B. STETSON, GEORGE OS-
GOOD, CORNELIUS COLE, BENJAMIN A. BRISTOW, R.
W. TAYLER.

EQUITY.—No. 4748.

- I. A deed absolute on its face may be shown by parol to be a security for a loan of money.
- II. A single witness, swearing to an acknowledgment of the defendant that an absolute deed was a security, will not be allowed to overrule the instrument, where the answer and the testimony of the defendants deny the fact of a loan.

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STATEMENT OF THE CASE.

This is an appeal from a decree of the Equity Court, passed October 19, A. D. 1876, dismissing complainant's bill with costs.

The bill filed December 27, 1875, sets forth that on or about the 8th day of December, A. D. 1870, the plaintiff borrowed of the defendants Osgood & Stetson the sum of \$500, and to secure the repayment of the same executed an absolute assignment to them of certain claims which the plaintiff had against the British Government for goods and merchandise destroyed by the so-called Confederate steamers Alabama and Florida, which said claims were then on file in the State Department at Washington, D. C.; that it was distinctly understood and agreed by and between the parties at the time that the said assignment was intended by way of security only, and that the plaintiff was to have the privilege at any subsequent time of paying back the sum borrowed, with interest at current rates, and having the said assignment cancelled; that afterwards Osgood & Stetson, through their attorney, Cornelius Cole, filed their claims as assignees of plaintiff in the Court of Commissioners of Alabama Claims, and obtained an award for the sum of \$9,853.11; that the plaintiff has offered and is ready to repay the said loan of \$500 with interest, but that the said defendants Osgood & Stetson have refused, and still refuse, to accept the same and cancel the said assignment according to the agreement, and claim the entire amount of said award, denying that the plaintiff has any interest therein whatever.

The plaintiff then prays that an account may be taken, and a decree passed making a just and equitable disposition of said award, and that Osgood, Stetson, and Cole may be enjoined from drawing, and Bristow, Secretary of the Treasury of the United States, and R. W. Tayler, First Comptroller, from paying the amount of said award during the pending of the suit.

The answer denies that the assignment was intended only

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as a security for the repayment of the \$500, but avers that the plaintiff sold to the defendants Osgood & Stetson his said claims absolutely for \$500, in gold coin, and gave them therefor an absolute assignment, a copy of which is filed as a part of the answer; it denies the right of plaintiff to any part of the award, which it avers was \$6,649.27, instead of the amount alleged in the bill; it further states that the plaintiff, Hubbard, presented his claim to the said Court of Commissioners of Alabama Claims at the same time that the assignees, Osgood & Stetson, presented theirs, and that the said court duly adjudicated the said conflicting claims between the assignor and assignees, and finally rendered judgment in favor of the assignees, Osgood & Stetson.

The complainant was examined as a witness on his own behalf, and his evidence confirms the allegations of his bill that the assignment of his claims, although absolute in form, was intended as a security for a loan of \$500.

Charles H. West testified that he knew Dimon Hubbard; was in his room in December, 1870, when Stetson was present; that Stetson asked Hubbard to go around to Mr. Mastick's office to make some new assignments about some Alabama claims, as he had no security for \$500 he had loaned Hubbard; that Hubbard said he had already made one or two or three assignments, and did not see the necessity of making any more. Stetson said he had not sufficient security, and in case anything happened to Hubbard he would not be able to get that money from Hubbard, if he had to wait till that time; that the assignment made was no security at all; that they were in no condition to take any risk; that just before Stetson went out he said: "If you will go around to Mastick's office and fix this assignment I will give you a suit of clothes."

The defendants Osgood & Stetson both testify that the assignment was absolute both in form and fact; that they purchased the claims for \$500 in coin, and took the risk of their payment; that they were Alabama claims, and that the transaction took place about a year previous to any treaty

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between the two governments. They explain the reason of applying to complainant for a special power of attorney to be that they had been informed that he was endeavoring to sell the claims over again. The case is here on an appeal from an order dismissing the bill.

J. M. Yznaga and Bainbridge H. Webb, for complainant.

Enoch Totten, for defendants Osgood & Stetson.

Mr. Justice MACARTHUR delivered the opinion of the court:

The rule that a deed absolute on its face may be shown by parol evidence to be a security for a loan of money, is now well-settled law. The assignment in the present case is a sale of securities, and, at the date of the instrument, these securities were simply claims of doubtful value. There was no certainty that the injuries sustained from the Alabama would ever be recognized or paid by the government. It is a circumstance which we cannot overlook that they had no value, except a speculative one, until a year afterwards, when the treaty of Washington was entered into by the United States and the Government of Great Britain. Under these circumstances no inference in favor of this being a loan is to be drawn from the fact that the amount paid was greatly less than the face of the claims. The disproportion, we think, therefore, should not have much weight either way. The parties purchasing assumed the risk of losing the whole, and it appears that the complainant had made previous unsuccessful attempts to dispose of them to other parties, thus showing the doubtful character of their value among persons engaged in that business.

The form of the deed is an absolute transfer of these claims. There is no provision made for repaying the money, and it is admitted that in order to show that the transaction was a loan, the express terms of the instrument must be overruled by the parol statements of witnesses. This kind of proof is admissible, but it ought clearly to show that the contract did not express the intention of the parties. The testimony, we think,

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is inadequate to establish the fact of a loan. The defendants Osgood & Stetson flatly contradict the complainant, and swear positively to the sale. The answer, which is responsive to the bill, denies that it was a loan. A single witness will not be sufficient to overcome the answer of the defendant, especially when it is supplemented by their examination as witnesses. The testimony of West, who was examined by the plaintiff, is equivocal. Stetson testifies that on the occasion referred to by West he asked for a special power of attorney, because he had been informed that the complainant was endeavoring to sell the claims over again. We can, therefore, attach no special importance to this circumstance. West also swears that Stetson spoke of the assignment as a security. It is to be noted that the witness is speaking of a conversation in the office of the complainant, and is, therefore, carefully to be considered and cautiously to be admitted. This is the only circumstance in the case, aside from what the complainant has said, that is entitled to any weight; but the court cannot attach such an importance to an acknowledgment, coming from a single witness, and which may have been qualified or misunderstood, so as to overthrow a written instrument and impeach the pleadings in the case. This would be giving an effect to parol proof which would endanger the integrity of any contract executed for a money consideration.

The decree below must be confirmed.

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CAROLINE AND HENRY KAISER v. GEORGE W. STICKNEY, SURVIVING TRUSTEE, AND JOHN A. J. CRESWELL, ROBERT PURVIS, AND R. H. T. LEIPOLD, COMMISSIONERS OF THE FREEDMAN'S SAVINGS AND TRUST COMPANY.

EQUITY.—No. 4552.

- I. A deed of trust executed by husband and wife upon her real estate as security for money advanced to the wife alone, is effectual to pass her title in the property for the purpose of securing the loan in a court of equity.
- II. A husband conveyed lands to a third party, who conveyed the same to the wife by arrangement, with the usual covenant of warranty. A creditor who advanced money to the wife for the improvement of the property and to pay off prior liens thereon, took a deed of trust upon the property from both husband and wife. It was held that she could enter into the contract; that the deed was binding upon her, and that the court would make a decree of sale of the property to pay the indebtedness.

STATEMENT OF THE CASE.

The original bill in this cause was filed by Henry Kaiser and Caroline, his wife, for the purpose of preventing a threatened sale of property under the powers of a deed of trust.

On the 17th day of April, 1871, Henry Kaiser and Caroline Kaiser, being indebted to the Freedman's Savings and Trust Company in the sum of \$12,000 for money borrowed from the trust company, made a joint promissory note for that sum, payable one year after date, with interest at the rate of ten per centum per annum. To secure the payment of this note, they executed, acknowledged, and delivered to Eaton and Stickney an ordinary trust deed, by which they conveyed to the trustees the property involved in the suit, with power to sell the same at public auction on default in the payment of the note. This note and the deed of trust were executed by both of the complainants. The money borrowed on this security was paid out by the proper officer of the trust company to remove various liens upon the prop-

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erty conveyed by the trust deed, and to pay for the erection of a building thereon. This disposition of the fund was made in pursuance of a written contract.

After this money had been exhausted, another loan was negotiated for by the complainants from the trust company. On the 25th day of October, 1871, they borrowed the additional sum of \$4,000, and jointly signed another promissory note for that amount, payable one year after date, with interest at ten per centum per annum, and to secure its payment jointly executed and acknowledged a second deed of trust, by which they conveyed the same property to the same trustees. This deed also contains the usual powers of sale in case of default. These trust deeds were promptly recorded. There is now due on this debt over \$18,500 for principal and interest, and the taxes and arrears, which must be paid, amount to over \$2,200, so that there is now due not less than \$20,000, for which the property is bound.

The original bill was exhibited, signed, and sworn to by Henry Kaiser and his wife. The grievance complained of is, that this first deed of trust was not the result of the joint act of husband and wife; that Henry Kaiser signed the deed "by request as a witness," and that he was not in any manner "consulted" about it; and they aver that, as the husband of Caroline, Henry was her legal agent and entitled to the management of her sole and separate estate, and to the rents and profits thereof, and that the rents and profits thereof have been diverted to pay the interest on this \$12,000 loan; and the bill further avers that Caroline, the wife, had no legal power to make the contracts held by the trust company. The deed is appended to and made a part of the bill, and it shows on its face that it was signed and acknowledged by both Henry Kaiser and his wife, Caroline. The second deed was also signed and acknowledged by both of them.

Simultaneously with the filing of the answer of the commissioners of the trust company, they filed a cross-bill asking that the property might be sold by a trustee appointed by the court, because of the harshness of the terms of sale pre-

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scribed by the trust deed. To this cross-bill Caroline, the wife, interposes an answer, in which she alleges that her husband is *non compos mentis*. The debt is not denied, and the mental incapacity of the husband is not sustained by the proofs.

John A. Grow, for complainants.

Enoch Totten, *contra*.

Mr. Justice HUMPHREYS delivered the opinion of the court:

In September, 1867, Henry Kaiser, husband of Caroline, executed a deed to the lots in question to Frederick Johnson, who immediately conveyed the same, by deed, to the wife, Caroline, absolutely. This was a good conveyance, as no creditors of the husband contest. It is not pretended that he was indebted at the time. This conveyance was good, independent of the statute in force in this District in relation to the *sole* estate of married women. Nor is this conveyance regulated by the provision that the title of the wife is as absolute as though she were a *feme-sole*. In regard to this conveyance, she is not to be regarded as a *feme-sole*. Other rules regulate her powers and liabilities over this property.

Having an estate in the property, without the intervention of a trustee, with limitations in the terms of settlement, she is to be governed in her disposition thereof by the rules of equity. Being the owner of this property, she borrowed, in 1871, of the Freedman's Savings and Trust Company, the amount in controversy, and executed a deed of trust to secure the amount upon said lots. In this deed her husband joined. The matter may have terminated disastrously to the wife, but she got the money; and it is stated by the record furnished by her counsel—and such is the fact—that the husband was induced to convey the property to the wife.

She took charge of it, and now she complains that, as she was a married woman, she could not bind her estate. An unmarried woman of the proper age may make such disposition of herself and property, in the absence of fraud and im

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position, as she pleases. A married woman may contract in regard to her separate or absolute property in an equitable mode or manner. In a case of imposition or circumvention or fraud the courts would be very jealous in guarding a married woman, particularly against the intrigues of a husband, trustee, or other person holding a fiduciary relation. But when she assumes to go out on the broad field of trade and speculation, she must abide by her contracts. In this case the record shows us that she induced the husband to surrender his property to her management and control, and that she borrowed, on the credit and faith of her sole management of said property, a large amount of money. The law is too long and well settled, that any person coming into equity must do equity, for us to undertake to shake or unsettle that rule. Better let the old rule of the restrictions and liabilities of trustees to their wards and *cestuis que trust* remain as it is. But this case is not one, under the statute, of the exercise of power by a married woman as though she were a *feme-sole*, nor of the power of a married woman under a settlement, ante-nuptial or post-nuptial; but it is a question of a person, with power to make contracts, asking a court of equity to relieve from the obligations of a *prima-facie* legal obligation, without even offering to perform any equitable action. The money has been obtained from the savings and trust company; it has gone to build up the estate of complainant. Even the husband joined in the conveyance by deed of trust, and there is no offer to pay back what has been borrowed. It is sought to declare the whole matter of the obligation to pay back the money, or to hold the security therefor, void and of no effect. We cannot see the case in that light, and before this can be done the parties interested must procure the mandate of a court whose power we are bound to respect. The decree is affirmed.

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THE BALTIMORE AND OHIO RAILROAD COMPANY v.
THE DISTRICT OF COLUMBIA.

EQUITY.—No. 4405.

The act of the Legislature of Maryland incorporating the Baltimore and Ohio Railroad Company provided that the shares of the company were to be deemed and considered personal estate, and to be exempt from the imposition of any tax or burden by the States assenting to the law. This law was amended February 23, 1831, so as to enable the company to construct a branch road to the line of the District of Columbia, and the amendment contained a proviso that it should not be construed to preclude the Legislature from the imposition of such taxes as might be reasonable and just, in accordance with the burden imposed on other real and personal property.

By an act of Congress, March 2, 1831, the company was authorized to extend this branch road to the city of Washington, subject to the same rights and immunities as those in the charter.

I. That the act of Congress had reference to the original charter of the company as amended, and that its property lying and being in the District of Columbia is subject to taxation the same as the property of individuals.

II. That an act of Legislature under which a railroad company claims that its property is exempt from taxation is to be strictly construed, and if there is any doubt about its meaning the claim will not be sustained.

III. That the liability for unpaid taxes reaches back for a period of twenty years from the institution of the suit.

STATEMENT OF THE CASE.

The bill of complaint was filed to enjoin the District of Columbia from selling property of the defendant for default in the payment of taxes on real estate due to the old corporation of Washington and to the District of Columbia.

Complainant claims immunity from taxation by virtue of section 18 of its charter, granted by the Legislature of Maryland February 28, 1827, whereby it is provided that "the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burden by the States assenting to this law."

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The complainant also maintains that certain of the taxes due to the corporation of Washington, "even if validly levied, have been forfeited by waiver, acquiescence, laches, or lapse of time," which is sought to be presumed from the fact, that though the complainant, between 1836 and 1843, paid taxes to the corporation, it then ceased to pay them, denying their liability therefor; and in 1850 entered into an agreement with the corporation looking to the removal of the passenger depot, whereby complainant agreed to pay all taxes then in arrears other than on the road-bed, cars and engines, without, however, waiving the right of contesting liability to future taxation, and taxes were then paid by complainant down to 1854, after which complainant refused to pay taxes, and in 1858 obtained an interlocutory injunction against any sale; after which time no further attempt was made by the corporation or the late District government to *collect the taxes by sale of the property.*

With reference to the taxes claimed to be due to the District of Columbia, and levied under the acts of the Legislative Assembly, the bill maintains that that body had no power to make delinquent taxes a lien upon property, nor to authorize or empower the collection or payment thereof by sale of property.

It was admitted that the answer of the defendant correctly sets forth the taxes charged against the real estate of the Baltimore and Ohio Railroad Company by the corporation of Washington and the District of Columbia; and that, apart from the question of the authority to levy such taxes, said answer is correct in respect to amounts and the number of years for which the taxes were levied, or attempted to be levied, and all other facts shown by said answer, including the nature and purposes of the several assessments and taxes; that the rate of taxation levied upon the property of the complainant is that imposed on other real property in the city of Washington, or District of Columbia, by the respective ordinances and acts of assembly and of Congress, under which the taxes are claimed to be due upon the property

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of the complainant. It is also admitted that from 1836 to 1843 complainant paid taxes to the corporation of Washington on the property of the former, but then ceased to pay them, denying their liability therefor; that in 1850 the complainant entered into articles of agreement with the corporation of Washington, looking to the removal of their passenger depot from Pennsylvania avenue to its present site, the grading of the streets, &c., in which, among other things, complainant agreed to pay to said corporation of Washington all taxes then in arrears other than on the road-bed, cars, and engines held by the complainant in the city of Washington, without, however, waiving the complainant's right to contest its liability to future taxation; and that taxes were paid by the complainant down to the year 1854; that the complainant then refused to pay taxes, and in 1858, upon the threat of the collector of taxes of the corporation of Washington to sell their property for taxes, obtained an interlocutory injunction against such sale, since which time, and until the proceedings set forth in the bill and answer in the present suit, no further attempt was made by the corporation of Washington or the late District government to collect such taxes by sale of the property.

Exhibits accompanied the pleadings containing true copies of the original charter of the complainant and of the amendment thereto authorizing it to construct a branch road towards the District of Columbia. But as the opinion contains such portions of them as are material, it is unnecessary to state them further here. The case was certified to be heard at the general term in the first instance.

James A. Buchanan and *Walter S. Cox*, for complainants.

The act of the Assembly of Maryland of February 28, 1827, which incorporates the complainant, declares (section 18): "*And the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burden by the States assenting to this law.*"

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The act of Congress of March 2, 1831, (4 Stats. at Large, p. 477,) which authorizes the extension of the railroad into the District, referring to the act of Maryland, declares that "the said Baltimore and Ohio Railroad Company are hereby authorized to exercise the same powers, rights, and privileges, and shall be subject to the same restrictions in the extension and construction of the said lateral railroad into and within the District as they may exercise or are subject to, under and by virtue of their said charter or act of incorporation, in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, compensation, benefits, and immunities in the use of said road, and in regard thereto, as are provided in said charter."

Whatever immunity was conferred by the original act of Maryland was extended by this act to the District of Columbia.

It is maintained that there is such identity between the property of the company and the shares of stock that the exemption of the latter is the exemption of the former. To tax one would be to tax the other. A tax on both would be duplicate taxation.

It is not maintained that duplicate taxation is void where not prohibited by constitutional provisions.

It is not maintained that one of these subjects may not be exempted and the other taxed, where it is clearly a mere selection of the form in which taxes shall be imposed and collected. But the propositions are, that a general, unqualified exemption of the shares of the capital stock is necessarily an exemption of the property; that any burden on the latter would defeat such exemption and conflict with the grant.

Such is the uniform view maintained by the authorities. (See *Appeal Tax Cases*, 12 G. & J., 117; *Baltimore v. Baltimore and Ohio Railroad Company*, 6 Gill, 288; *Gordon v. Baltimore*, 5 Gill, 231; *Gordon v. Tax Court*, 3 How., 133; *Bank Tax Case*, 2 Wall., 200; *Rome Railroad Company v. Rome*, 14 Ga., 275; *Augusta v. Georgia Railroad and B. Company*, 26 Id., 651; *Hannibal and St. Joseph Railroad Co. v. Shackland*, 30 Mo., 552; *Savings Bank v. New London*, 20 Conn., 111;

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New Haven v. City Bank of N. H., 31 Conn., 106; *Smith v. Town of Exeter*, 31 N. H., 556; *Bangor and Piscataquis Railroad Company v. Harris*, 21 Maine, 533; *State v. Brannin*, 23 N. J., 484; *State v. Tunis*, Id., 546; *Boston Glass Company v. Boston*, 4 Met., 181; *Nuestadt v. Illinois Central Railroad Company*, 30 Ill., 484.)

It is further submitted that the present claim of taxes is stale, and would not be enforced by the courts, and ought not to be allowed to be enforced by the summary proceeding of sale.

It will be seen that twenty-two years ago the complainants ceased to pay taxes, under a claim of exemption, and that this has been acquiesced in by the late corporation of Washington and the District authorities ever since, except that in 1858 a mere threat of sale was made by the collector of taxes, when an injunction was issued against him, and the matter has rested there ever since. If the corporate authorities were allowed after such acquiescence to proceed to collect twenty years' arrearages of taxes claimed, a private citizen might be ruined by the accumulation of taxes which he supposed to be abandoned. A third or more of his property would be swept away at once. As no court would lend its aid to anything so unjust, so we submit that the court ought to interfere to prevent it.

Edwin L. Stanton, for the District of Columbia.

The Maryland act of February 28, 1827, does not exempt the property of complainant from the imposition of taxes by other governments than that of the State of Maryland.

1. The language by which a government surrenders its right of taxation must be so clear and so strong as to leave no room for doubt. Exemptions must be strictly construed. A reasonable doubt must be solved in favor of the power to tax. (*Cooley on Taxation*, 146; *Bailey v. Maquire*, 22 Wall., 215; 21 Wall., 499.)

The taxes due to the corporation of Washington have not been forfeited by laches or the failure to collect the same.

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1. The contention of complainant on this point applies only to taxes due to the late corporation and long delinquent. It clearly does not apply to those levied by acts of Congress of June 20, 1874, and March 3, 1875; nor to those levied by acts of the District Assembly; nor to those levied by the corporation of Washington within a period in which, as between individuals, the statute of limitations would not bar enforcement of a lien on land. This leaves for consideration only the corporation taxes for 1854 and 1855. And the collection of taxes for these two years has, since 1858, been hindered and delayed by the complainant itself. So that, in point of fact, there has never been any such laches or negligence on the part of former municipal authorities as to forfeit the right to enforce collection of any part of the taxes involved in this suit.

2. Suppose, however, there had been laches or negligence of former municipal officers in respect of enforcing collection of part of these taxes by sale of property, and to such extent as that a court of equity would not lend its aid in making the collection now. It does not follow that, therefore, and as contended in the brief for complainant, "the court *ought to interfere to prevent it.*" Frequently a court of equity will not interfere at the suit of either party to a controversy. Lapse of time may be an important consideration where, being unexplained, it involves such laches or negligence by the injured party as to no longer entitle him to the countenance of a court of equity. (*Rhode v. Massachusetts*, 15 Peters, 272.) That principle applies where the injured party is the suitor; not where the wrong-doer invokes the co-operation of the chancellor in renewing and perpetuating the wrong in a more daring and flagrant form.

The taxes levied by the late Legislative Assembly of the District may be lawfully collected by sale of the property of the company.

The Legislative Assembly had power to make taxes a lien on land; and the act of February 21, 1871, evidently designed that this power should be exercised. Repeatedly in

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the organic act the power of the Assembly to levy tax on property is recognized. Section 40 of that act left in force all laws and ordinances of the cities of Washington and Georgetown, not inconsistent with said act of Congress, until modified or repealed by Congress or the Legislative Assembly of said District. This left in force—but subject to future modification by either Congress or the Assembly—section 7, act of May 17, 1848, (9 Stats. at Large, 427,) whereby it is provided that real property may be sold at public sale to satisfy taxes. Section 18 of the act of February 21, 1871, (16 Stats. at Large, 423,) extends the legislative power of the Assembly to all “rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of” said act; subject, nevertheless, to all the restrictions and limitations imposed on States by the tenth section of the first article of the Constitution. It certainly was a rightful subject of legislation to provide for the collection of taxes.

Besides, the act of Congress of June 20, 1874, ratified the legislation of the Assembly creating a lien for delinquent taxes, and directed its enforcement, just as the authorities were proceeding to do when enjoined in this suit.

Even if the real estate of the company were exempt from general taxes by either Maryland or the United States, still it is not exempt from assessments for improvements or betterments, of which there are many shown upon the schedule accompanying defendant’s answer. (Cooley on Taxation, 147, and cases stated.)

Mr. Justice WYLIE delivered the opinion of the court :

The object of the bill in this case, is to enjoin the District of Columbia from levying any tax upon the property of the railroad company within the District. The railroad company was incorporated by the State of Maryland on the 28th February, 1827, for the purpose of constructing and operating a railway from the city of Baltimore to the Ohio River. By the eighteenth section of the charter the shares in the company were to be deemed and considered personal estate, and

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declared to be exempt from the imposition of any tax or burden *by the States assenting to this law*. By an act of Congress approved March 2, 1831, the Baltimore and Ohio Railroad Company was authorized to extend its road to the city of Washington, and "to exercise the same powers, rights, and privileges, and shall be subject to the same restrictions, in the extension and construction of the said lateral railroad into and within the District, as they [it] may exercise or are [is] subject to under and by virtue of their [its] said charter or act of incorporation, in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, compensation, benefits, and immunities, in the use of said road, and in regard thereto, as are provided in said charter."

On behalf of the company it is claimed that, by virtue of these two acts, the real estate of the company, being represented by its shares, is exempt from taxation, not only in the "States assenting to this law," but also in the State of Maryland and in the District of Columbia. A strict construction of this language of the charter would perhaps not exempt even the shares of the company from taxation in Maryland, whatever might be its effect in other States assenting to the law. When the charter was granted, it was known that, in order to reach "some suitable point on the Ohio River," the road must be constructed through the territory of other States, as well as that of Maryland, which could be accomplished only with their assent. Now, this language of exemption in its strict—if not indeed in its most natural—meaning applies only to those States assenting. The State of Maryland "*enacted*" the charter; other States might assent to the construction of the road. The company might have been willing to intrust itself to its own parent in the matter of taxation, but have been anxious to secure in advance protection from hostile legislation in other States through which it was necessary that the road should pass. If this be the proper construction, then Maryland did reserve to itself, in the charter of 1827, the power to tax even the shares of the company's stock held

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within her own jurisdiction, and consequently the same right is now vested in the District of Columbia; for the benefits and immunities conferred by the act of Congress of 1831 are such only as belong to the company "within the State of Maryland." Whether Maryland has or has not chosen to use this power of taxing the company, is a matter which should have no influence upon the question. If the power belonged both to Maryland and to the United States, the policy of Maryland as to the road within her territory could have no effect upon the authority of the United States over the branch road within this District.

And the same may be said in regard to the decisions of the Court of Appeals of Maryland. So far as they give construction to the charter in that State as to questions of property, they are entitled to absolute authority; but as to rights claimed under the act of Congress, within this District, although entitled to great respect, they are not conclusive. We hold to the old rule, that charters, especially where the question is one as to the exemption of property from taxation, are to be construed strictly, and not liberally, or rather latitudinously, as laid down in *Mayor v. Baltimore and Ohio Railroad Company*, 6 Gill., 296. In another view, also, we think the claim for exemption cannot be sustained. The language of the act of Congress relied upon for this purpose is the following: "The said Baltimore and Ohio Railroad Company are hereby authorized to exercise the same powers, rights, and privileges, and shall be subject to the same restrictions, in the extension and construction of the said lateral railroad into and within the District, as they may exercise or are subject to under and by virtue of their said charter or act of incorporation, in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, compensation, benefits, and immunities in the use of said road, and in regard thereto, as are provided in said charter."

Here is certainly no express exemption of the property of the company from taxation; but the benefits and immunities

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granted to the company are such as relate to the use of the road, and in regard to the use of the road, as are provided in the charter. That is the grammatical construction of the language. The relative "thereto" refers to its proper antecedent, the word "use," and not the word "road"; so that the privileges so conferred were benefits and immunities in connection with the use and working of the road, and not as to the property of the company in the road. At the date, however, of the passage of this act of Congress, under which the exemption is claimed in the present case, through an occult reference to the company's charter of 1827, that charter had been altered by an act of the Legislature of Maryland passed 22d February, 1831. This act recites that it was passed at the instance of the Baltimore and Ohio Railroad Company, and the object was to enable that company to construct the present branch road to the line of the District of Columbia. It provides for issuing additional stock, and reserves to the State the privilege of subscribing for the whole amount of the stock within two years, and grants the usual privileges in such cases; but also contains the following proviso: "That nothing herein contained shall be so construed to preclude the Legislature of this State from the imposition of such taxes as may be reasonable and just, in accordance with the burdens imposed on other real or personal property."

Now, by the fourteenth section of the charter of 1827, the company had previously been authorized to make, or cause to be made, lateral roads, in any direction whatsoever, in connection with said railroad, from the city of Baltimore to the Ohio River; and by the thirteenth section it was authorized to increase the amount of its capital stock to any extent required to accomplish the objects of the company. But no lateral road was ever constructed under these provisions towards the District of Columbia, and the privilege, as thus conferred by the charter of 1827, was partially surrendered in exchange for the act of 22d February, 1831, under which the State expressly reserved, as has been stated, the right to tax the road between the Relay station and the District line.

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Such was the condition of the company at this date in relation to the branch road. It had surrendered its privilege to construct this branch road under the original charter, and consented to be taxed in exchange for the privileges conferred by the amendment. Notwithstanding this fact, however, ten days afterwards Congress passed the act of 2d March, 1831, under which the present claim to exemption is asserted, on the ground that this refers back to the "immunities and benefits" which had been conferred upon the company by the original charter. Undoubtedly there were benefits and privileges granted by the act of Congress relating to the use and control of the road which was to be constructed, but immunity from taxation was not one of them; for that had been expressly surrendered to the State, and should be regarded as expunged from the charter at that date. The branch road was constructed alone in pursuance of the amended charter and the act of Congress, so that when the latter act refers to the charter of the company as the act which at that time authorized the company to construct the branch road, it must be understood to refer to the charter so amended by the act of 22d February, 1831. This is manifest from the preamble to the act, which is in these words:

"Whereas it is represented to this present Congress that the Baltimore and Ohio Railroad Company, incorporated by an act of the General Assembly of Maryland entitled 'An act to incorporate the Baltimore and Ohio Railroad Company,' passed the 28th day of February, 1827, are desirous, under the powers which they claim to be vested in them by the provisions of the before recited act, to construct a lateral branch from the said Baltimore and Ohio Railroad to the District of Columbia; therefore, &c."

This preamble contains a statement of the representation made to Congress by the company, and evidently refers to the charter, as then recently amended, for the purpose of enabling the company to construct the Maryland portion of the road; for at that time the company possessed no authority to construct a branch road towards the District, except

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under the amendment. Then follows that part of the act under which this immunity is claimed, which, with its context, is as follows:

"Be it enacted, &c., That the Baltimore and Ohio Railroad Company, incorporated by the said act of the General Assembly of Maryland, shall be, and they are hereby, authorized to extend into and within the District of Columbia a lateral railroad, such as the said company shall construct, or cause to be constructed, in a direction towards the said District, in connection with the railroad which they have located and are constructing from the city of Baltimore to the Ohio River, *in pursuance of their said act of incorporation.* And the said Baltimore and Ohio Railroad Company are hereby authorized to exercise the same powers, rights, and privileges, and shall be subject to the same restrictions in the extension and construction of the said lateral railroad into and within the said District, as they may exercise, or are subject to, under and by virtue of their said charter or act of incorporation, in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, compensation, benefits, and immunities in the use of the said road, and in regard thereto, as are provided in their said charter," &c.

Upon the whole, it appears to us that it was the intention of Congress by this act to give permission to the Baltimore and Ohio Railroad Company to extend its road into and within the District, under the same charter by which the road was to be constructed to the line of the District, and that this purpose is expressed in the act, if we assume that the amendment is to be regarded as constituting a part of the charter. It was under this amendment, and this only, that the company was authorized to construct the branch between the main line and the line of the District; and in the act of Congress which we are construing, that act is referred to by the words "*pursuance of their said act of incorporation.*"

In the construction of statutes, as well as wills, it is often

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necessary that some particular intent should be made to yield to the principal and main intent of the Legislature. In the present case the principal and main intent was to enable the company to construct its branch road within the District under the same charter by which it was about to construct the Maryland end of the road.

Upon the whole, we think that no one could reasonably say that the claim of exemption from taxes set up by the company in the present case is such a claim as can be clearly made out; and this doubt is fatal to the claim. Statutes granting exclusive privileges are strictly construed. (*Mohawk Bridge Co. v. Utica et al.*, 6 Paige, 554; *Cayuga Bridge Co. v. Magee*, 6 Wend., 85; *Pennsylvania Railroad Co. v. Canal Commissioners*, 21 Penn. St. R., 22; *Commonwealth v. Pittsburg, &c., Railroad Co.*, 24 Id.)

The language of the Supreme Court of the United States in *Bailey v. Maguire*, 22 Wall., 226, applies with so much aptness and force to the facts of this case that we quote it at some length:

“It has been held many times in this court that a State may make a valid contract that a corporation, or its property within its territory, shall be exempt from taxation, or shall be subject to a limited and specified taxation.

“The court has, however, in the most emphatic terms, and on every occasion, declared that the language in which the surrender is made must be clear and unmistakable. The covenant or enactment must distinctly express that there shall be no other or further liability to taxation. A State cannot strip itself of this most essential power by doubtful words. It cannot, by ambiguous language, be deprived of this highest attribute of sovereignty. This principle is distinctly laid down in each of the cases referred to. It has never been departed from. (*Erie Railway Co. v. Pennsylvania*, 21 Wall., 498.)

“It is manifest that legislation which, it is claimed, relieves any species of property from its due proportion of the general burdens of government, should be so clear that there

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can be neither reasonable doubt nor controversy about its terms. The power to tax rests upon necessity, and is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment. While it were better for the interest of the community that this power should on no occasion be surrendered, this court has always held that the Legislature of a State, unrestrained by constitutional limitation, has full control over the subject, and can make a contract with a corporation to exempt its property from taxation, either in perpetuity or for a limited period of time. If, however, on any fair construction of the legislation, there is a reasonable doubt whether the contract is made out, this doubt must be solved in favor of the State. In other words, the language used must be of such a character as, fairly interpreted, leaves no room for controversy. * * * It is conceded that the exemption is not granted in express terms; but it is argued that, taking the whole section together, it arises by necessary implication. We do not think so. * * *

"It is never for the interest of the State to surrender the power of taxation; and an intention to do so will not be imputed to it unless the language employed leaves no other alternative." (*Bailey v. Maguire*, 22 Wall., 226, 227.)

The doctrines thus announced were reiterated by the same court, with still greater emphasis, in 22 Wallace, 528, and again in *West Wisconsin Railway Co. v. Board of Supervisors*, 3 Otto, 595. And in both these cases the court announces another doctrine, which goes still further, and seems to be altogether fatal to the present claim. That doctrine is thus stated in the syllabus to *Tucker v. Ferguson*: "An act of the Legislature exempting property of a railroad from taxation is not a 'contract' to exempt it, unless there be a consideration for the act. An agreement, where there is no consideration, is a nude fact—the promise of a gratuity spontaneously made, which may be kept, changed, or recalled at pleasure. And this rule of law applies to the agreements of States made without consideration as well as to those of persons." And the court says: "The case of *Christ Church Hospital v.*

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The County of Philadelphia, 34 How., 301, is instructive upon this subject. In 1833 the Legislature of Pennsylvania passed an act declaring 'that the real property, including ground rents, now belonging to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to said hospital, shall be and remain free from taxes.' In 1853 a law was passed which subjected the ground rents to taxation. The Supreme Court of the State sustained the validity of the latter act;" * * * and the Supreme Court of the United States unanimously affirmed this judgment.

And in the other case, in 3 Otto, 595, the doctrine is thus stated in the syllabus: "The doctrine announced in *Tucker v. Ferguson*, 22 Wall., 527, that an act of the Legislature of a State, exempting property of a railroad company from taxation, is not, when a mere gratuity on the part of the State, a contract to continue such exemption, but is always subject to modification and repeal in like manner as other legislation, reaffirmed, and applied to this case."

That the exemption granted by the act of March 2, 1831, by the United States to the Baltimore and Ohio Railroad Company—conceding, for the sake of argument, that such exemption was granted by that act—was a mere gratuity, and no contract, is manifest from the recital in the preamble, and, indeed, from every section. The act was passed at the solicitation of the company and for its benefit, and was wholly without consideration in favor of the government.

In regard to the length of time for which the company should be held liable, we are of opinion that such liability reaches back for a period of twenty years from the institution of the present suit. It is a liability created by statute, and nothing short of a lapse of time sufficient to raise the presumption of payment will exonerate the property from its liability, and that period is twenty years. (See *Ang. on Lim.*, 83, and authorities cited.)

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WILLIAM W. YOUNG v. THE DISTRICT OF COLUMBIA.

No. 13,418.—AT LAW.

In an action where the declaration is for a personal injury to the plaintiff caused by his falling into an excavation made in a street or highway, it is necessary to prove on the trial that such alleged excavation was within the limits of the street itself.

STATEMENT OF THE CASE.

The declaration of the plaintiff sets forth that there is in the city of Washington a highway called Nineteenth street, which the defendant was bound to keep in such condition as to render it safe for passing and repassing, on foot or otherwise; yet, nevertheless, the plaintiff says that on the 13th day of June, 1874, the said street, in its roadway and its sidewalk, between B and D streets south, was out of repair and in a dangerous and unsafe condition by reason of the gross negligence and default of the defendant, of all of which said defendant had notice; yet the said defendant, on the day and date aforesaid, not regarding its duty as aforesaid, wrongfully and negligently permitted and allowed a certain deep, dangerous, and great excavation to be and remain in said Nineteenth street, and wrongfully and negligently permitted and allowed said public street, in its roadway and sidewalk, to be and remain out of repair and in a dangerous and unsafe condition, unguarded and without light or signal or other warning, and made no effort to secure the same against accident, or to warn persons passing along and crossing over said public or common highway and its sidewalk of the existence of said excavation or deep pit, which defendant by its gross negligence suffered and so permitted to be made, and not repaired or guarded, by means of and in consequence of which gross negligence and failure of defendant to perform its duty in the respect aforesaid, the plaintiff then and there, to wit, on the day and year aforesaid, in the night-time, while walking moderately, prudently, and carefully along and over

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said Nineteenth street, crossing the same, fell, and was precipitated into said excavation or deep pit, whereby he (said plaintiff) fractured and broke the bones of his left ankle, and seriously sprained and bruised his left leg and ankle, and suffered and sustained other grave shocks to his person, by which, &c.

The plea was, not guilty.

The proof for the plaintiff tended to show that on the afternoon of July 13, 1874, he, with a friend, went from his residence, at the corner of Second and A streets, to the Eastern Branch, near the Washington Asylum, for the purpose of bathing and fishing; that on their way they crossed Nineteenth street in the neighborhood of the said asylum, but did not notice that Nineteenth street was being graded; that between the hours of nine and ten P. M. they started on their return home, following first a road and afterwards deviating from the road upon what appeared to be a beaten path along the north fence of the asylum; that the path had, prior to the excavation in Nineteenth street, gone directly across it and over the commons to the improved part of the city; that defendant had excavated Nineteenth street at the point where plaintiff fell, and that such excavation was nearly, if not quite, perpendicular; that plaintiff and his friend had frequently gone by said path, but neither had been there for a year preceding, and that neither of them saw the excavation, which was about eight feet deep, before they reached it, nor had they noticed it when going down to the wharf, and that the plaintiff had not recovered from his injuries, and probably never would.

The proof of the defendant establishes the fact that before August, 1873, said Nineteenth street was not actually opened as a highway; that at said date the work of grading and improving said street was begun; that in July, 1874, it had not been graded through and opened; that barricades were constructed at the intersection of C street to exclude travel, and that C street was the only public thoroughfare leading into the street in front of the asylum; that between the asylum

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and the Eastern Branch there were no streets or buildings but those belonging to the government; that the plaintiff was upon the grounds appurtenant to the asylum at the time when the accident complained of occurred to him, but that the portion upon which he was, was not at that time inclosed; but by reason of the work in progress on Nineteenth street, and in the construction of the jail, the fence had been taken down; that the pathway along which the plaintiff proceeded terminated at the gate leading into the asylum, and that the plaintiff, after passing said gate, was not upon a pathway, and did not thereafter follow a pathway up to the point from which he fell; that the defendant fell from within the building line and outside of the limits of Nineteenth street; that he fell from the ground of the Washington Asylum; that at the time he fell the entire space for a sidewalk and carriage-way at Nineteenth street had been excavated in front of the asylum, and for four or five hundred feet south thereof, and for about the distance of a square or more north thereof. It was admitted on the part of the plaintiff that no highway or thoroughfare was ever laid out on the said reservations east of Nineteenth street upon any of the plans of the city of Washington, or was authorized by any of the ordinances of the said city, or by any enactment of Congress.

At the close of the testimony, the defendant's counsel requested the court to instruct the jury, among other prayers, as follows: "That upon the evidence the plaintiff was not entitled to recover; and also, that if, at the time of the accident, the plaintiff was proceeding along a pathway which was not a regularly and legally or authoritatively established highway of said District, and if, so proceeding, he fell into Nineteenth street southeast, and if the accident which happened to him resulted from no imperfection of construction or repair in Nineteenth street southeast, then the plaintiff is not entitled to recover; and also, if the damages complained of resulted from the fact that the grade of the highway called Nineteenth street southeast was below the level of a foot-path which was not a municipal highway, then and in that case

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the plaintiff is not entitled to recover; and also, that the plaintiff's declaration alleged that the accident complained of occurred to him while he was walking along and over Nineteenth street southeast, crossing the same, and that while he was so walking he fell into an excavation in said street. If the jury believe from the evidence that there did not exist at the time and place of the accident an excavation in said street; that said street was below the grade of abutting land on either side; and if they further believe that the defendant did not fall from a part of said street into an excavation or pit in said street, but that he fell from land outside of said street into said street, then, and in that case, the plaintiff cannot recover under his present declaration."

All of which prayers, and several others not necessary to mention, the justice presiding at the trial refused to give to the jury; to which refusal the defendant's counsel excepted before the jury retired. The court thereupon instructed the jury on the measure of damages. The verdict was in favor of the plaintiff.

Bradley & Duwall, for plaintiff.

The plaintiff will maintain that there was no error in the ruling of the court below.

First. He says the question whether the District can be made liable for injuries resulting to an individual from the imperfect condition of the public highways in said District is no longer an open question in this court.

Second. They have power to open, grade, and keep in repair streets, avenues, and highways within the District of Columbia. But in doing so they are liable "to the same extent and in the same manner as private corporations and natural persons" for injuries resulting from the *manner* in which they execute those powers, and must so use them as not to injure that which belongs to another, or improperly invade private rights. They may erect buildings or other works, but if in doing so, for instance, they cause water of a running stream to flow back on private owners, the latter

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would have their action for damages the same as if the injury had been caused by an individual. (*Eastman v. Meredith*, 30 N. H., 296; *Bailey v. Mayor, &c., of New York*, 3 Hill, 541; *Thayer v. Boston*, 10 Pick., 511; *Rhodes v. Cleveland*, 10 Ohio, 159; *Lacour v. Mayor, &c., of New York*, 3 Duer, 406; *Brower v. Mayor, &c., of New York*, 3 Barb., 254; *Treadwell v. Mayor, &c., of New York*, 1 Dayl., (N. Y.) 123; *Barnes v. District*, 1 MacA., 322.)

And where "a municipal corporation has control of a public common traversed by foot-paths, on which the public rightfully travels, it is liable to a common-law action for damages caused by a dangerous and unguarded excavation made by the corporation for its own purposes, in the ground adjoining one of the paths, to a person walking thereon, and who was at the time using due care. (*Oliver v. Worcester*, 102 Mass., 489, 499. At page 499 read what Gray, J., says. See, also, *Savannah v. Cullens*, 38 Ga., 334; *Parker v. Macon*, 39 Ga., 725.) And it was the duty of the corporation to put up guards, signals, or something to give notice of the danger. (*Carleton v. Franconia Iron Works*, 99 Mass., 216; *Bacon v. Boston*, 3 Cush., 180; *Milwaukee v. Davis*, 6 Wis., 374.) The uninterrupted use of the path spoken of by plaintiff and numerous other persons publicly, by day and night, more than a year before the injury occurred, was an implied invitation and license to plaintiff to use at this time, and no evidence was given of a revocation thereof.

William Birney, for the District of Columbia.

The essential averments of the declaration are not sustained by the evidence: (1) That Nineteenth street was a highway, used as such; (2) that it was out of repair; (3) that defendant allowed a dangerous excavation to be in it; (4) that defendant neglected to put up guard-lights or other warning; (5) that plaintiff, while walking along over said Nineteenth street, fell into said excavation; (6) that the accident resulted from the defective repair of said street.

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The proofs are: (1) That Nineteenth street was not a highway, used as such, but was in process of preparation for a highway; that the grading was only partly finished, and that the street was not yet opened for public travel, but was barricaded to prevent it; (2) that it was not out of repair where plaintiff fell; (3) that there was no excavation in it; (4) that defendant, for twenty-three days before the accident, had been deprived of the legal power to guard the street; (5) that plaintiff, when he fell, was not walking along and over Nineteenth street, but over grounds outside of said street; that he did not fall into an excavation *in said street*, but from a high bank outside of the street, upon its graded surface, where there was no excavation; (6) that the accident did not result from the defective repair of Nineteenth street, but from the plaintiff's falling into said street, which was in perfect repair. The plaintiff might possibly frame a good declaration on the facts of his case, but he cannot recover on the declaration filed; the variance between it and the proofs is too flagrant. (*Jones v. Boyce*, 1 Stark., 493; *Eldridge v. L. R. R. Co.*, 1 Standf., 89.) "The cause of the injury ought to be fully and correctly stated in the declaration." (*Lund and Wife v. Tyngsboro*, 14 Cush., 567.) The plaintiff cannot recover if he was not on a highway at the time of the accident, and if the accident did not result from a defect of construction or repair of a highway of which the defendant was in charge. (*Tisdale v. Norton*, 7 Metc., 388; *Barber v. Roxbury*, 11 Allen, 318; *Murphy v. Gloucester*, 105 Mass., 470, 599; 1 Allen, 30; *Hayden v. Attleborough*, 7 Gray, 343.) It was not the duty of defendant to put up at night guard-lights or other warnings on the prison grounds of the Washington Asylum, which were elevated above the grade of the street. At the time of the accident the plaintiff was in the commission of a trespass on those grounds, and was there at his own risk. (1 Add. on Torts, 228, 229, 232, 260, 292, 375; *Hurdcastle v. South York R. R. Co.*, 4 H. & N., 74; 28 Law J. Exch., 139; *Blyth v. Topham*, Cro. Jac., 159.)

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Mr. Justice MACARTHUR delivered the opinion of the court:

The declaration states a good cause of action. It alleges that the injury was caused by a deep, dangerous, and great excavation in Nineteenth street, which the defendant had allowed to remain in said street, in its roadway and sidewalk, and which was unguarded and without any expedient to warn persons passing along and crossing over said highway and its sidewalks. In order to make good this declaration, it was incumbent on the plaintiff to prove that he was passing along or crossing over Nineteenth street, and that he fell into a pit or excavation in the street itself. It appears by the proof that he was outside of the street, and that he sustained no damage in consequence of any defect or any want of repairs in Nineteenth street. The issue raised by the pleadings was whether the alleged injury resulted from an excavation in the street, and of this there was neither proof nor pretense at the trial. The plaintiff was not travelling on Nineteenth street, but on what he calls a foot-path, at the time of the accident. This foot-path was on the grounds of the Washington Asylum, and within the limits of a government reservation; and whether the plaintiff had a right to use it after nightfall or not, it is quite certain that it had never been dedicated to the public in such manner as to make the District responsible for damage done to individuals passing over it, or to keep it in repair.

It appears from the testimony that the work of grading and improving Nineteenth street was begun previous to the occurrence for which plaintiff claims damages, but that it had not been graded through or opened; that at the place where the accident occurred a grade of about eight feet deep had been cut, and that the entire space or width of the street, including the carriage-way and sidewalks, had been excavated for four or five hundred feet each way north and south from where the plaintiff fell, and that there was no other street or highway ever laid out on the reservations east of Nineteenth street; that C street was the only public thoroughfare leading into the street in front of the asylum, and that barricades

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were constructed at the intersection of C street and Nineteenth to exclude travel entirely from the latter during the progress of the improvement. It also appears that plaintiff was outside of the limits of Nineteenth street, and that he fell from the grounds of the Washington Asylum. It is, therefore, plain that no damage was caused by any defect on the travelled track of Nineteenth street. The District had the right to reduce the grade of Nineteenth street southeast, and it was their duty to exclude passengers, on foot or otherwise, while the work was going on, or at least to give some signal of warning to the public. This they did by barricading C street, which was the only public thoroughfare leading into it in that locality. But the District is not bound to adopt these precautions in order to signalize individuals who stray out of the public roads and deviate into private paths belonging to other parties. It would be exposing municipal liability to a dangerous responsibility if they were bound to erect barricades where the public have no right to travel. It is only when the dangerous place is so near to the public roads or highways as to make it unsafe for travellers that the District is bound to exercise these precautions, and when individuals leave the roads and highways which are provided for public travel, they must take the risk and be their own guard. Whether an action can be framed upon the special circumstances of this case, we cannot determine; but, for the reasons assigned, we are of opinion that the judgment must be reversed and a new trial ordered.

Bohrer v. Fay.

GEORGE A. BOHRER AND JULIUS S. BOHRER v. JOHN
C. FAY, WILBUR S. SUPPLEE, AND ALEX. SHARP.

EQUITY.—No. 4711.

- I. A court of equity will not enjoin a judgment at law; where the remedy is adequate and complete at law; and where a motion to open the judgments on the same grounds as those set forth in the bill has been made in the court where the judgments are pending, and which motion is undetermined, there is no ground of relief in equity.
- II. The jurisdiction in chancery to stay proceedings at law upon a judgment is well established, but cautiously exercised. A mere defect of jurisdiction is not sufficient. Equity will interfere only to prevent injustice which has not been brought about by the negligence or inattention of the party aggrieved.
- III. The complainant in the bill must allege and prove that he has a good defense to the action at law, and explain the merits of such defense, and how he has been prevented from availing himself of it.

STATEMENT OF THE CASE.

This is a bill in equity to enjoin the defendants from enforcing a judgment at law, and a decree to that effect was obtained in the court below. The judgments whose collection is enjoined were rendered April 22, 1871; the bill in this case was filed November 23, 1875. The complainant Julius S. Bohrer was the principal defendant therein, and the summons in the case was returned *non est*, and a judgment was taken by default for failure to appear and answer. On the same day the process was returned, a writ of garnishment was returned served upon George A. Bohrer, the other complainant herein, who filed an informal answer thereto, not under oath. On the 16th day of March, 1871, interrogatories were filed and served upon the garnishee by Mr. Fay, who was plaintiffs' attorney in the action at law. No answers were filed to the interrogatories, and a judgment of condemnation against the garnishee without an inquest was entered, upon which execution was issued May 22, 1871.

On June 24, 1871, the following motions were filed to strike out the judgments at law:

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"The garnishee, George A. Bohrer, moves the court to set aside the judgment rendered against him in the above cause, and assigns as reasons therefor: 1st. That he had answered fully the attachment. 2d. That the interrogatories served on this garnishee were not authorized by law. 3d. That the attachment affidavits are fatally defective. 4th. That the garnishee is not indebted to the defendant, and has valid, legal, and meritorious defense.

"SAMUEL L. PHILLIPS,

"*Attorney for Garnishee.*"

"The defendant, protesting against the jurisdiction of the court, moves the court to set aside the judgment by default entered in the above, and assigns for reasons: 1st. That he had no notice that the said cause of action was pending against him. 2d. That the said judgment is void, as the said court had no jurisdiction to render a general judgment against the defendant, there being no service of process of the said defendant, he being a citizen of the State of Maryland. 3d. That there is nothing due to the said plaintiff by reason of the cause of action set forth in said declaration.

"JULIUS S. BOHRER, *Defendant.*"

And thereupon, on the same day, the judgments were by the court vacated and set aside; from which order the plaintiff appealed to the court in general term.

On the 23d day of February, A. D. 1872, the order striking out said judgments was reversed; and on March 5, 1872, a new motion was filed, by leave of the court, to strike out the judgment against George A. Bohrer, garnishee, which motion had been heard but not determined when this bill was filed.

The suit remained in this condition until the 23d day of September, 1875, when a writ of execution was again ordered against the garnishee, and the complainant then filed the bill herein to restrain all further proceedings in the suit at law; the grounds set up in said bill for relief being substantially embraced in the motions referred to in the suit at law, to wit, irregularities and want of jurisdiction.

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R. Ross Perry, for complainants.

A court of equity will relieve against a judgment at law, provided the garnishee show a sufficient excuse for his delinquency in failing to answer. (Drake on Attachment, sec. 637*e*; *Baker v. Glover*, 2 Cranch C. C. R., 682.)

The question of jurisdiction is always open to inquiry, whether it be raised directly or in a collateral proceeding. (Drake on Attachment, sec. 85; *ex-parte Watkins*, 7 Peters, 572; 1 Peters, 329.)

The affidavits in this case were fatally defective in two respects: 1. The affidavit of the witness does not swear to the non-residence of the defendant as the statute requires. (Rev. Stat. D. C., sec. 782.) This defect is fatal. (Drake on Attachments, secs. 85-98.) 2. The affidavits both purported to be made upon information and belief, and are in this respect fatally defective. (Drake on Attachment, secs. 100, 104, 106, 108, and other authorities there quoted; *Garner v. White*, 23 Ohio, 192.)

An answer was actually filed by the garnishee on the 9th of December, 1870, before the return day of the writ. There was not then, and is not now, in force any rule of law or of court requiring this answer to be under oath. (Rule 16, new rules; rule 17, old rules.) The proceedings, therefore, of the 15th of March, 1871, concerning interrogatories, were irregular and unauthorized. The rule of court providing for these interrogatories was not passed until the 15th day of February, 1873. The interrogatories in question were not accompanied by any rule to answer, and were served by Fay in person, instead of the marshal. The whole proceeding was entirely improper, unauthorized, and void.

It appears from the testimony of Bohrer, that while he did not recognize Fay's authority in the premises, he yet prudently took the copy left with him to Mr. Meigs, the clerk of the court, and was informed by him that no further answer was necessary in the premises.

The judgments entered on the 22d day of April, 1871, were entirely irregular. 1. There was a general judgment

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entered against the defendant for \$800, interest and costs. In an attachment proceeding, where the defendant is not served with process, no personal judgment can be rendered against him, but only a condemnation on the *res* attached. (*Boswell v. Otis*, 9 How., 336; *Drake on Attachment*, sec. 5.)

2. Judgment of condemnation was entered against the garnishee without any inquisition or finding by the court of assets in his possession. This was irregular and void. (*Stephenson v. Giberson*, 1 Cranch C. C. R., 319.)

John C. Fay, for defendants.

A court of equity will not enjoin the collection of a judgment at law merely on account of a defect in jurisdiction, or for want of jurisdiction. (14 How., 584; 24 Wis., 394; 11 Wis., 391; 19 Cal., 78; 6 Johns. Ch., 28; 5 Wall., 413; 49 Cal., 267.)

That irregularity in obtaining the judgment, unless substantial injustice has been done, is insufficient to warrant the interference of a court of equity. (*Kerr on Injunctions*, 23; 10 Iowa, 121; 9 Iowa, 367; 6 Gill., 391; 17 Md., 195.)

That the complainants had a plain, adequate, and complete remedy at law.

To warrant interference where a party fails to defend a suit, it must appear that the defense was not available in a court of law, or he was prevented by fraud, accident, or the wrongful act of the other party, without *negligence* on his part, from availing himself of it. (1 Comstock, 274; 1 Breese, 60; 1 Bibb, 173; 20 How., 161; 17 How., 443.)

The complainants must show themselves guilty of no laches before they seek relief in equity. (5 How., 192.)

Relief will not be granted after judgment, unless some special equitable grounds can be shown. (*Kerr on Injunctions*, 23.)

The complainants having allowed *four years* to elapse, and the statute of limitations having intervened to bar the defendant's claim, ought not to be permitted, by taking advantage

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of their own laches, to prevent the defendant ever recovering his demand.

The irregularity complained of had been heard and determined at law on a motion to strike out the judgment, and the court in general term had denied the motion; and we contend that a court of equity will not enjoin a judgment where the question of irregularity has been passed upon by a court of law, even though the court erred in its decision.

The equities of this case are with the defendant. The proof shows that at the time the attachment was laid in the hands of George A. Bohrer, he, George A. Bohrer, had property in his hands of the complainant, Julius A. Bohrer, exceeding the sum of two thousand dollars, more than twice the defendant's demand; and, with full notice and knowledge of the attachment and the judgment against him, he paid it over to Julius S. Bohrer, and to a subsequent attaching creditor, except \$350, which he still has.

He also procured the attachment of Supplee's judgment in his own hands, and did his utmost to have it condemned in favor of Shaw.

The affidavit is in exact conformity with the rules of court. (Rule 17, p. 4, Rules of Court, ed. of 1869.)

The judgment was properly entered against Julius S. Bohrer; publication had, by order of the court, been substituted for personal service; and judgment was rendered in exact conformity with the eighty-first rule of the court, page 21, Rules of Court, edition of 1869:

"81. If the summons has been returned 'not to be found,' and a day has been fixed by order of the court for the defendant's appearance, and duly published, a judgment by default may be entered against the defendant as in case of failing to appear after personal service of the summons." (14 Stats., 493, secs. 7, 8.)

The interrogatories were properly served and are expressly authorized by the act of Maryland of 1795, section 5, which was in force in this District. The garnishee having appeared in proper person in answer to the writ, it was unnecessary to

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have him again served by the marshal; he was in court, and had full and fair notice; no fraud was practiced or attempted; true copies were left with him, and in default of his answer the court was expressly authorized to condemn the credits in his hands.

Mr. Justice MACARTHUR delivered the opinion of the court:

We do not deem it a matter of any consequence in this case to decide whether the affidavit upon which the attachment issued in the suit at law was in conformity to the rules of the court upon that subject, or to the requirements of the statute; nor whether the proper practice was observed in regard to the service of interrogatories upon the garnishee; nor whether the judgments were regularly and properly entered. These are all matters of practice, in regard to which the remedy is full, adequate, and complete at law. This appears to have been the belief of the attorney therein, who made a motion in that action to set aside the proceedings for these very causes, and the motion was granted by the Circuit Court; which, however, was reversed by the general term and the judgments reinstated. It is said that the decision of the general term was not upon the merits of the case, but was simply to establish a rule of practice, to wit, that it was irregular to set aside a judgment upon an *ex-parte* application. This may be conceded. But if such was the case the motion could be renewed, and such we find to have been the fact; for the motion to set aside the judgment by default was again made by the garnishee by permission of the court, and that application is still pending and undetermined.

These applications afford all the remedy to which the party is entitled, and leaves the complainant without any grounds of relief in equity.

The jurisdiction of chancery to stay proceedings at law upon a judgment, though well established, is cautiously exercised. A mere defect of jurisdiction is not sufficient. The party must show in addition that the interference of equity is necessary to prevent injustice, which has not been brought about

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by the negligence or inattention of the party aggrieved. (2 Story Eq. Jur., sec. 898; High on Inj., sec. 85; *Bateman v. Wilbor*, 1 Sch. and Lef., 204, in addition to cases cited in brief by complainants' counsel.) It must also clearly appear that the party complaining cannot avail himself at law of the equities relied upon to enjoin the judgment. (High on Inj., sec. 86, and cases cited in n. 2.) An application of these principles to the present case must operate to dismiss the complaint. The judgment was founded upon two promissory notes given to Supplee by one Michael J. Brown, and endorsed by Julius S. Bohrer and his wife. There is no averment in the bill denying the execution of the notes or alleging that they were not endorsed by said Julius and wife. The bill states that Julius believes that he has a good and valid defense to the action, but sets forth no explanation of the defense, or of what it consists. This general averment is not sufficient in a bill to stay a judgment rendered by a court at law. It should appear how the defense arises, so that the court may see that the complainant has been deprived of a substantial right without any fault on his own part. Both sides took testimony, and the only defense that can be discovered in the proofs is, that notice of presentment and non-payment was not served on Bohrer as endorser. This, however, is a good defense at law, and the judgment is not binding upon him without personal service, any further than his credits in the possession of George A. Bohrer at the time of the service of the attachment are concerned; and probably the seventh section of the act of February 22, 1867, 14 Stats. at Large, 403, would authorize a judgment after publication, against a defendant who cannot be found, in regard to his real and personal property within the jurisdiction of this court. The only effect of a judgment in such case would be to fix the amount, so that the garnishee need not pay any more than is due. The notes, however, were protested, which would be sufficient to sustain a judgment against the endorser unless the circumstances were such as to show fraud, which is not pretended in the case before us. The bill alleges that George A. Boh-

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rer was garnished in an action at law against the defendant Supplee and Julius S. Bohrer, and that judgment was obtained therein by Greenbury Shaw for the sum of \$2,055.36, and that he, the said George A. Bohrer, settled the same for about the sum of \$600, which was composed of certain credits of the said Julius which came into his hands subsequent to the 25th day of May, 1871. It is impossible to comprehend what right this gives the garnishee to come into a court of equity to arrest the judgment. It was an act of his own with which Supplee had no agency, and about which he was not consulted. If he voluntarily paid a debt of Supplee with the means of Julius in his hands, how can he claim an offset here without showing some knowledge or consent on the part of Supplee? It would be proper to set up all these matters in answering the interrogatories, and to ask the court at special term for an opportunity to do so. If his motion prevails he can answer, and if it is denied it will undoubtedly be for the reason that there are no merits in his application. Many of these circumstances were relied upon as reasons for opening the judgments in the actions at law. Over four years have elapsed since the judgments were entered, and the statutes of limitations have intervened to bar action on the notes; and as it appears that all the rights of the parties can be litigated on the law side of the court that have not been already settled, the bill here should be dismissed; and such is the order of the court.

WYLIE, J., concurred in the judgment, but dissented from that part of the opinion which held that a judgment might properly be entered against the defendant brought in only by publication.

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JAMES E. POWER ET AL. v. JAMES S. AND SAMUEL T. DAVIS, EXECUTORS, ET AL.

EQUITY.—No. 4740.

- I. When a codicil to a will of real and personal estate was found among the papers of the deceased, which he had signed, bequeathing legacies, and there was an attestation clause in his own handwriting which was not subscribed by any attesting witnesses, the presumption of law in such case is that the testator intended to acknowledge and publish it in the presence of witnesses, and that it is, therefore, incomplete and invalid as a testamentary paper.
- II. The will contained a general direction for paying debts, but they were not in terms made a charge upon real estate. The children were each to take an equal share in the estate. The codicil bequeathed money legacies to the complainants, but created no fund for their payment: *Held*, That the real estate devised is not liable to contribute to make up any deficiency in the personal property for the payment of legacies.
- III. The will gave a better title to the devisees than they would acquire by descent. They therefore take by purchase, and not by descent.

STATEMENT OF THE CASE.

This is a bill for marshalling assets against the devisees in the will of the late James Y. Davis.

The testator appointed his wife, Harriet, and his sons, James S. and Samuel T., to be his executors, and directed them to pay his debts and settle his estate as soon as practicable. He then directed that his said sons should have the right and privilege to take his business and stock in trade on account of their share in his estate, and that they should exercise this privilege within thirty days after his will was filed in the Orphans' Court. The testator then devised all the rest and residue of his estate to his wife in trust for the use of herself and children, and in the event of her death or marriage the said estate should be vested in his said sons as executors, to control and manage the same according to the laws of the District of Columbia. He then directed that each of his children should have an equal share in his estate. If neither of his said sons accepts or exercises the privilege afore-

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said, the whole estate is to vest in his executors, to be by them managed according to the laws of the District. The will was dated July 30, 1864, and in 1865 the testator made a codicil giving to his mother an annuity of five hundred dollars.

The testator died on the 18th day of October, 1871, and there was found among his papers a writing dated August 1, 1871, purporting to be a codicil to said will, giving to the complainants and several other persons money legacies amounting to \$25,000.

The body of this instrument is in the handwriting of the testator, and it is signed with his genuine signature. It contains an attestation in the following words:

“Signed, sealed, published, and declared by the said James Y. Davis as and for a codicil to his last will and testament, in the presence of us, who, at his request, and in his presence and the presence of each other, have here subscribed our names as witnesses thereto.”

This clause was not subscribed by any attesting witnesses. The two sons qualified as executors under the will, and upon a settlement of their account, on the probate side of the court, the personal estate was found insufficient to pay all the debts against the estate. The executors, who were also creditors, after exhausting the personal assets, obtained a decree in this court for the sale of a portion of the real estate, and the remaining indebtedness was paid off.

The wife and mother both died before the testator. Under these circumstances the original bill was filed by the legatees in the codicil last mentioned; and they allege in their bill that the personal property is sufficient to pay their legacies, and pray that if the executors have used up the personal property in paying debts, then that they may be paid from the real estate. The infant defendants answered by guardian *ad litem*, denying that the said paper-writing is a part of the last will and testament of the testator, or that it is a valid codicil thereto for any purpose whatever; they also deny that the said legacies are a lien upon the real and personal

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estate of the testator, and they aver that the personal estate was exhausted in the payment of debts. The answer of the executors is to the same effect.

The amended bill charges, among other things, that the debts being a charge both upon the real and personal property alike, and the legacies being a charge only upon the personal estate, and the executors having exhausted the personal property in paying off the debts, then the complainants are entitled to stand in the place of the original creditors, and that said heirs take by descent; and concludes with a prayer to have the amounts marshalled, &c.

The defendants filed answers to this amended bill, in substance, the same as to the original bill, to which general replications were filed.

In regard to the codicil in controversy, William H. Ward, who prepared the original will, was examined as a witness, and testified that "some time in the spring or summer of 1871, Mr. James Y. Davis came to see me and told me that he desired to make a codicil or addition to his will. He asked me to prepare a form for the same, leaving the names of the legatees and the amounts of the legacies blank, stating that he had not made up his mind as to the persons or the amounts, and that he would fill the said blanks himself. He spoke of his intention to give something to his relatives who were not provided for in his last will. I did so prepare the form in ink, with instructions in pencil as to how the same should be signed and witnessed, which paper I left at his place of business. So far as I recollect, the codicil presented here is a copy of the one prepared by me. I believe it to be a verbatim copy."

The case is now sufficiently stated to understand the points decided.

John J. Johnson and R. K. Elliott, for complainants.

The object of the suit is to subject the real estate of the testator, James Y. Davis, to the payment of the legacies bequeathed in the second codicil to his will.

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I. The second codicil is a valid and sufficiently executed and proved testamentary disposition of the personal chattels of the deceased. Similar papers, even less formally executed, have been recognized by the courts.

In the case of *The Trustees v. Bruce*, 1 H. & McH., 510, the will was not signed by the testatrix, nor attested by witnesses. The day of the month and year and the name of the executor were left blank. Held good to pass personal property.

A testamentary paper found in an iron chest, without signature, having an attestation clause, written by the deceased, valid for personal estate. (*Watts v. Leroy*, 4 Wend., 168.) Though a paper imperfect on its face may not be admitted, yet one perfect in itself and found with the will is valid as to personalty, *non obstante* it contains a disposition of realty. In this case the codicil was perfect on its face, but unexecuted. (*Brown v. Tilden*, 5 H. & J., 371.)

Blackstone says in his Commentaries, vol. 2, p. 501: "A testament of chattels written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good, provided sufficient proof that it is his handwriting." (*Strish v. Pelham*, 2 Vern., 647; 4 Ves. Jr., 201, note.)

II. The legatees under the second codicil, which bequests are good against the personal property only, have a right to resort to the real estate to reimburse to the personal estate the amount thereof used to pay those claims—viz., debts and legacies under the will and first codicil—which were chargeable as well upon the real and personal estate. It is conceded that the personal estate is the natural and primary fund for the payment of debts and legacies; but where the personal estate not being sufficient to pay the legacies both by the will and codicil, and the real estate being liable to the legacies by the will, and not those by the codicil, the estate should be marshalled, so that, as far as possible, the whole might take effect and all the legacies be paid. (1 P. Williams, 423; 2 P. Williams, 620.) A specific or other legatee shall stand

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in the place of a bond or judgment creditor, if these take their satisfaction out of the personal estate. (1 P. Williams, 679; 2 P. Williams, 720.) If a creditor has two funds, he shall take his satisfaction out of that which another creditor has no lien. (2 Atk., 446; 8 Ves., 388; Story Eq. Jur., sec. 566.) A mere bounty of the testator entitles the legatee to call for this species of marshalling; that if the creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. So that wherever there is a double fund, though the court will not restrain a party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law or by the act of the testator. (Powell on Mort., 890; 1 Mad. Ch., 767, 769; 3 Bland, 502, 516, 38; Story Eq. Jur., secs. 558, 566.) Legatees are entitled to the same equities where the personal estate is exhausted by specialty creditors; otherwise they would be without any means of receiving the bounty of the testator. (Story Eq. Jur., secs. 565, 566; Adams Eq., 589.) As between a legatee, either pecuniary or specific, and the heirs at law, if a debt chargeable both on the real and personal estate is paid by the executors out of the personal property in the first instance, the legatee will be permitted to stand in the place of the original creditor, *pro tanto*, and he may recover the amount of his legacy, or to the extent of the personal property so appropriated, out of the real estate descended to the heirs. (3 Page, 402.) Where one legatee has two funds to resort to for payment of a legacy, and another has only the personal estate, then the assets should be marshalled. (9 Hare, 659.)

III. The defendants take the real estate of the testator by descent, and not as specific devisees. These lands are, therefore, not exempt from sale for the payment of specific and pecuniary legacies. It is a well-established principle of the law of real property, that if a person is entitled to the same quality of estate in the two characters of heir and devisee, he will take by his preferable title of descent. (*Doe v. Tim-*

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nis, 1 B. & A., 530; *Cowden v. Clarke*, Hob., 29; *Godolphin v. Abingtons*, 2 Atk., 57; *Claplin v. Leroux*, 5 M. & S., 14.) In *Huinsworth v. Pelby*, Cro. Eliz., 832-919, there was a devise to the oldest son in fee upon condition that if he paid not certain specific legacies to the testator's daughter, the land should go to his second son; the court held that the devise in fee to the heir, being no more than what the law gives, was void. A limitation to an heir in a devise is void; the heir cannot be a purchaser. (Co. Litt., 22 b; *Mainbridge v. Plummer*, 2 M. & K., 93.) The rule is, if a man devises by his will his land to his heir at law and his heirs, the devise as such is void, and the heir will take by descent, and not by purchase, for the reason that the title by descent is the worthier and better title. (Powell on Devises, 427; 6 Greenleaf, 151; Jarman on Wills, 67; *Ellis v. Page*, 7 Cush., 161.)

James G. Payne, for defendants.

I submit, in the first place, that the paper-writing of August 1, 1871, is not good or effective as a testamentary disposition of any kind of property. Upon its face it is unfinished and incomplete. It has an attestation clause in the handwriting of the testator, showing it to be his intention that the execution of the paper should be attested; that it should be by him published and declared in the presence of witnesses, as a codicil to his will, before it should become complete and operative as such a codicil. It shows a suspension of his intention to dispose of his property in the manner indicated, and that the intention or purpose so suspended was never resumed. When the testator has chosen to prescribe to himself a special mode of execution, and afterwards neglects to comply with such prescribed formalities, the inference to be drawn from these circumstances is, that he had not fully and definitely resolved on adopting the paper as his will. So when the paper is written and signed by the testator, and has an attestation clause or memorandum, *not subscribed by witnesses*, the presumption of law is against it, and it is not a good will even for personal property. (1 Williams on Executors, p. 72; 1

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Jarman on Wills, pp. 93, 98, 156; *Beaty v. Beaty*, 1 Adams, 158; *Walker v. Walker*, 1 Merivale, 503; *Mathevs v. Warner*, 4 Vesey Jr., 186; *Scott v. Rhodes*, 1 Phill., 19; *Harris v. Bedford*, 2 Phill., 177.) In the latter case Sir John Nicholl said: "As the natural inference to be drawn from an attestation clause at the foot of a testamentary paper is that the writer meant to execute it in the presence of witnesses, and that it was incomplete in his apprehension of it till that operation was performed, the presumption of law is against a testamentary paper with an attestation clause not subscribed by witnesses,"—"it is imperfect." And such is the uniform language of the courts in the cases cited. In *Modern Probate of Wills*, p. 56, of unfinished or informal papers, it is said that the law on this subject is inflexible. The following American cases are directly in point and conclusive: *Waller v. Waller*, 2 Gratton, 454; *Rochelle v. Rochelle*, 10 Leigh, 125; *Tilghman v. Stewart*, 4 Har. & J., 156; *Plater v. Groome*, 3 Md., 134; *Barnes v. Syester*, 14 Md., 507. There are other cases which treat of evidences of incompleteness in other parts of the instrument, the leaving of blanks, &c., which I have not cited. The courts in all these cases, and the text writers on the subject also, say that "those who assert the testamentary character of such an instrument must show distinctly, and by extrinsic proof, either that the deceased intended the paper, in its actual unfinished condition, to operate as his will, or that he was prevented by death or involuntary accident from completing it." In the present case there is not an attempt to comply with either of these requirements. Not an atom of such proof has been offered. The courts also say the presumption against the instrument is stronger where it seeks to affect real estate. That is what is sought to be done here. Also, that the presumption of law is stronger against it when it is to alter a previously executed testamentary instrument. Here the paper in question seeks to alter and revoke, *pro tanto*, the original will—a will perfect and complete in all its parts, and formally executed. Twenty-five thousand dollars of the property de-

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vised by that will to the testator's children is to be taken from them, and more than four-fifths of it given to persons who are no kin to the testator or his family. It is not strange that the testator should have halted in the accomplishment of such a scheme; and it is not unreasonable to presume that he never finally concluded to consummate it. To entitle the complainants here to substitution or a marshalling of assets, two conditions must unite: 1. The personalty must be exhausted in the payment of debts which were primarily payable from the realty; 2. The realty must be in the heir by descent, and not by devise. Neither of these conditions is found in this case. The personalty was exhausted in payment of simple contract debts, for which it alone, and *not* the realty, was primarily liable. Unless the realty be subjected to the payment of these debts, either by statute or by the will of the testator, such payment must be made from the personalty.

The realty is not so subjected by statute in this District, nor by the will of the testator. (2 Hilliard on Real Property, pp. 569, 577; 2 Jarman on Wills, 546; Story's Equity Jurisprudence, 552, 571-573; 2 Leading Cases in Equity, 210; *Aldrich v. Cooper*, 8 Vesey Jr., 389; *Hanna's Appeal*, 31 Penn., 53; *Byrd v. Byrd's Executors*, 2 Brock, 170; *Post v. Muckall*, 3 Bland, 499-516; *Chase v. Lockerman*, 11 Gill. & Johns., 185; *Gibson v. McCormick*, 10 Id., 65; *Stevens v. Gregg*, 10 Id., 143.) There must be a deficiency of personal estate before the creditor can resort to the realty, and the petitioning creditor must show such deficiency. (*Gaither et al. v. Welch*, 3 Gill. & Johns., 259; *Ellicott v. Welch*, 1 Bland Ch., 243; *Strike's Case*, Bland Ch., 89; *Fenwick v. Laughlin*, Bland Ch., 474; *Bank of U. S. v. Ritchie*, 8 Peters, (U. S.) 129.) In the chancery acts giving to the court the power to decree a sale of the real estate of a deceased person for the payment of his debts, that power is uniformly coupled with the condition precedent that the personal estate is insufficient. (Act of Maryland, 1785, chap. 72, sec. 5; *Id.*, chap., 78, sec. 1.) Nor does the real estate here go by de-

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seent; for although the original will devises all the estate to the heirs, it gives them a quality of estate *different* from that they would take in the absence of a will.

The direction of the testator is, *that each of his children shall have an equal share* in his estate. Under our law, as derived from Maryland, the children of parents who die intestate, seized in fee of lands, &c., take as coparceners. All expressions importing division by equal shares, or referring to the devisees as owners of respective and distinct interests—such as “equally to be divided,” “share and share alike,” “each an equal share,” &c.—create a tenancy in common, which is a different quality of estate from that of coparcenery. (1 Jarman on Wills, 68; 2 Hilliard on Real Property, 528; cases cited in 4 Am. Com. Law Rep., 361; *Gilpin v. Hollingsworth*, 3 Maryland, 190; *Hoffer and Wife v. Demert*, 5 Gill., 132; 1 Powell, 421, 428; *Hall v. Jacobs et al.*, 4 Har. & Johns., 245.)

Equity will not marshal the assets against the devisees of the realty, residuary or others. (2 Jarman on Wills, 601; 2 Williams on Executors, 1461; Roper on Legacies, 469; Adams Eq., 275; Story Equity Jurisprudence, 566; *Gridley v. Andrews*, 8 Conn., 2; *Swift v. Edson*, 5 Conn., 532; *Allen's Heirs v. Allen*, 3 Wall. Jr., 289; *Livingston v. Livingston*, 3 Johns. Ch., 153; *Chase v. Lockerman*, 11 G. & J., 185.)

Either of the three propositions I have contended for would defeat the case of the complainants, and all of the three are completely sustained by the facts in the case, and by the authorities I have cited as to the law. The defendants here are the children of the testator, and the court will not hastily take from them the substance of the ancestor and give it to strangers.

Mr. Justice MACARTHUR delivered the opinion of the court:

The complainants assume in their bill of complaint the validity of the codicil under which they claim as legatees. The defendants, who are the devisees mentioned in the will, assert that the codicil is not a good testamentary paper for any purpose, for the reason that it was never adopted by the

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testator in his life-time as a part of his will. This point must be decided mainly upon the face of the instrument itself. The codicil in question is signed by the testator beyond doubt; but he has added thereto an attestation clause in his own handwriting, which is not signed by any attesting witnesses. It is true that the law does not require a will of personal property to be witnessed by any one; yet when the testator has been anxious to write out upon the papers a memorandum of attestation, it is very clear that he intended to acknowledge and publish it in the presence of witnesses, and that he did not consider it complete until that formality was complied with. There is no proof or explanation in the testimony that the testator intended that the document should have its effect of a testamentary disposition in its imperfect condition; and we must, therefore, yield to the inference that he did not design it to have any effect in its present form. The English authorities appear to be uniform that "the presumption of law is against a testamentary paper with an attestation clause not subscribed by witnesses." Mr. Jarman, in his work on Wills, vol. 1, p. 92, cites the cases and explains the reasons on which they are founded. He observes: "Cases, however, sometimes occurred under the old law, and may possibly arise under the present, in which something more than a mere compliance with legal requirements was made necessary to the efficacy of the will by the testator himself, he having chosen to prescribe to himself a special mode of execution; for in such case, if the testator afterwards neglects to comply with the prescribed formalities, the inference to be drawn from these circumstances is, that he had not fully and definitely resolved on adopting the paper as his will." And he cites *Beatty v. Beatty*, 1 Adams, 154, where Sir John Nicholl said: "As the natural inference to be drawn from an attestation clause at the foot of a testamentary paper is that the writer meant to execute it in the presence of witnesses, and that it was incomplete in his apprehension of it till that operation was performed, the presumption of law is against a testamentary paper with an attestation clause not subscribed by wit-

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nesses." (See, also, *Walker v. Walker*, 1 Mer., 503; *Harris v. Bedford*, 2 Philp, 177.)

The American cases present an instance precisely like this in *Barnes v. Syester*, 14 Md., 507, where the deceased left a will which he had signed, and there was an attestation clause without being subscribed by any witness. The court remark:

"It is well settled that an instrument like the present is to be classed among unfinished testaments, on account of the attestation clause without witnesses, even where the party has signed it; that the presumption of law is against such paper, and, though a slight presumption, must be rebutted by extrinsic circumstances in order to its being pronounced for."

Other cases, though not precisely like this, seem to adopt the same view of the law; as, in *Waller v. Waller*, 1 Gratt., 454, where the deceased made a statement to an attorney in regard to his will, which was taken down from his lips and read over to him at the time, and he, approving of it, directed the attorney to copy it and bring it to him for execution. He lived four days and expressed anxiety to have the will, saying, when he had signed it his affairs would be finished, but he died before it came. The leading opinion in the case discusses the proposition, that as the will had been reduced to writing during the life-time of the testator, by his direction, whether it was not well executed for some purposes, and the court unanimously held that it was not. But on the subject of the attestation which was found at the foot of the paper, Cabell, J., observes, in a separate opinion: "It is manifest from the paper itself that he (the deceased) intended something further to be done; that it should be signed and acknowledged in the presence of witnesses. He did not, therefore, intend this paper, which is not thus signed and acknowledged, to be his will." *Tilghman v. Stuart*, 4 Har. & J., 175, and *Platen v. Groome*, 3 Md., 134, illustrate to some extent the same doctrine. According to this view of the law, the codicil under consideration is unfinished and incomplete as a testamentary paper, and the consequence is that we must hold it ineffectual for any purpose whatever.

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In addition to what has been said in regard to the validity of the codicil, I also think that the second branch of the defense is an answer to the relief prayed for in the bill. But on this point I only express my own views, for I am not quite sure that my brethren who heard the argument have given this point weight in their judgment.

The complainants claim a right to come upon the real estate for the amount of the personal property which has been applied to the payment of debts. This raises the inquiry whether the realty is subject to the payment of the legacies provided in the codicil. The facts to be considered are these: The original will contains a general provision for the payment of debts, but they are not made a charge upon the real estate, nor are they directed to be paid out of any particular property or fund. By the language of the will, the children of the testator are each to have an equal share of the estate. It is admitted, in point of fact, that the debts have been paid out of the personal assets, and that these being inadequate for that purpose, a lot of the land has been sold, under a decree of this court, and the proceeds applied to the payment of all the debts in full. The legacies in question are given in money, with the direction that they be paid without unnecessary delay. But the codicil creates no fund for their payment, nor are they charged, in terms, upon any portion of the estate. When these circumstances concur in the same case, the law is clear that the real estate devised is not liable to contribute to make up any deficiency in the personal assets for the payment of legacies. (*Hayes v. Seaver*, 7 Greenl., 237; *Humes v. Wood*, 8 Pick., 478; 2 Redf. on Wills, 869.) Nor will legacies prevail in a court of equity against a devisee of real estate, whether he be a specific or a residuary devisee, for they both take by the bounty of the testator. (1 Story Eq. Jur., sec. 565; *Forrester v. Leigh*, Ambler, 171; Jarm. on Wills, 601.) It is true that a creditor stands on a different footing, for he can resort to the real estate after the personal assets are exhausted. The general rule is, that the personal property is the primary fund for the

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payment of general creditors and pecuniary legacies not otherwise provided for in the will; but in the distribution, the creditor is preferred to the legatee, even if nothing is left for the latter. In some cases, however, a legatee, in the administration of assets, is entitled to special equities; where, for instance, the debts are, by an expression in the will, made a charge upon the real estate, or a trust is created for their payment. In all such cases, should the personal estate be exhausted by the creditors, the legatee would be permitted to stand in their place as against the devisee, and equity would compel the devisee to refund from the real estate an amount equal to the personal assets which had been absorbed by the debts. The same principle would apply in case of a specific lien given by a will on a particular fund for the satisfaction of a legacy. Should the fund thus pledged be appropriated by creditors, the legatee would be reimbursed out of some other portion of the estate. So, also, if the personal property were applied to the payment of a mortgage debt created by the testator in his life-time, a legatee would stand in the place of the mortgagee in regard to the real estate covered by the mortgage. The principle upon which a court of equity marshals the assets in circumstances like these against a devisee, is based upon the principle that whenever a creditor has two funds to go upon, and another claimant can resort to only one of them, and that is exhausted first by the creditor, the other party can take his place to the extent that the fund has been depleted upon which he alone had a lien. A creditor can enforce his demand against the personal estate, because as between him and the representative of the deceased that is the primary fund, (*Lupton v. Lupton*, 2 Johns. Ch. R., 624,) and it is first to be applied, even though the real estate may be charged. (1 Story Eq. Jur., section 571.) He has also a collateral right to resort to the real estate. He is thus doubly secured. Equity will, however, see that he exercises his rights so as not to absorb, beyond redress, the only security of another in one of the funds thus situated. This rule does not apply to this case, for neither the debts nor legacies

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are charged upon any part of the estate by the terms of the will. The personal property has been applied, as it ought to be, in the due course of administering the estate, and the fund for the payment of debts, and the only one for the payment of legacies, have been disposed of as the law directs. Legacies are never charged unless the testator has used language expressing that to be his intention, (*Lupton v. Lupton*, 2 Johns. Ch., 624,) and there is no such language in this codicil. We have seen that the creditor is preferred to the devisee, (1 Story Eq. Jur., sec. 507,) but the legatee is not. The devisee takes his gift by the will, without any incumbrance in respect to legacies unless it is expressed; subject, of course, to the rights of creditors. The equities of the devisees and legatees are therefore equal, and equity will not interfere. (1 Story Eq. Jur., sec. 571.) The testator had the power to incumber the devise with debts and legacies. There is nothing here but a general direction to the executors to pay the debts, and there is no evidence of any intention to charge them on the land in exoneration of his personal estate. If the testator had exempted his personal estate from the payment of his debts, as it was competent for him to have done, he would thus have clearly provided a fund for the satisfaction of his legacies, and the parties entitled thereto would have a controlling equity superior to that of a devisee, and he would have the relief he now invokes. Wills generally commence with expressions such as, "After the payment of my debts," or, "Imprimis, I direct my debts to be paid," which means the same thing, and afterwards there is devise of real estate. Numerous decisions are reported holding that language like this, charges the land with the payment of debts, and such may now be considered the established construction of all such expressions in a will. The author on wills already referred to appears to me to strain these authorities when he seeks to infer from them the doctrine that a mere direction to pay debts makes them a charge upon real estate, whether devised or not. In the cases to which he refers there was an express direction in the will that the debts or legacies

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should be first paid; and Chancellor Kent, in reviewing most of the same cases, in *Lupton v. Lupton*, *supra*, concludes by observing: "It is not sufficient that debts or legacies are directed to be paid. That alone does not create a charge, but they must be directed to be first or previously paid, or the devise declared to be made after they are paid." The same ruling was observed in Freeman's Chancery, 192, and in *Eyles v. Carey*, 1 Verm., 457.

I come to the conclusion that the land devised cannot be charged with the payment of the legacies, even conceding that the codicil is a valid instrument.

It is also contended that the devisees take as heirs, and not as devisees, which would let in legatees upon the devised estate. I think, however, it is quite clear that they take the real estate of the testator under the will as purchasers. The estate which they take by virtue of the devise is not the same as the interest they would inherit by descent. The title, therefore, passes to them by the will, as it is a better one than that conferred by the statute. This point has been frequently overruled in Maryland. (*Gilpin v. Hollingsworth*, 3 Md., 190; *Hoffar v. Derwent*, 5 Gill., 132; act of 1786, ch. 45.)

The bill of complainants must be dismissed.

WYLIE, J., concurred, being of opinion that the trusts expressed in the will deprived the legatees of any claim upon the real estate.

Wallach v. Van Riswick.

RICHARD L. WALLACH, CHARLES S. WALLACH, AND
JAMES ST. C. WALLACH v. JOHN VAN RISWICK.

EQUITY.—No. 2990.

A deed of conveyance executed by a grantor whose estate has been judicially confiscated under the act of July 17, 1862, (12 Stat., 589,) is of no effect, and conveys no interest or title; and on the death of such grantor the lands go to his heirs at law, subject to his debts created previously to the act under which the estate was confiscated, provided that the personal assets are insufficient.

STATEMENT OF THE CASE AND DECISION.

The Supreme Court of the United States, in deciding the demurrer in the original bill, held that, after the sale of the estate under the confiscation proceedings, Wallach had no longer any interest or ownership in the land which he could convey by deed to another, and no power which he could exercise for the benefit of another. A statement and decision of the case will be found in 2 Otto, 202. The demurrer was therefore overruled, and the case came back to this court for further proceedings. Van Riswick then filed this answer to the original bill, and on the same day, to wit, May 24, 1876, upon leave being granted for that purpose, filed a cross-bill asking for affirmative relief. Exceptions were interposed to the answer and a demurrer to the cross-bill. As they both set forth substantially the same facts, it is proposed only to state the determination of the court upon the issue raised by the demurrer to the cross-bill. The matters of fact set forth in the last-named pleading are, that Wallach, at the time of his death, which occurred February 3, 1872, was indebted to Van Riswick in an amount exceeding \$12,000 on various accounts, and that an account was stated between them at the time the deed was executed in settlement of said indebtedness, and which deed has been declared of no effect, as aforesaid, by the Supreme Court; that said indebtedness occurred previous to any act for which the property was confiscated; that the relation of client and attorney existed between them, and owing to said confidential relation Van

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Riswick was persuaded by Wallach, who was a lawyer, that the conveyance would operate to pass the reversion in fee-simple, and that he was not aware that this was a misapprehension until the decision rendered upon the demurrer to the original bill by the Supreme Court of the United States, in February, 1876, and that no part of said indebtedness has ever been otherwise paid to him; that after the purchase by Van Riswick at the confiscation sale, and, indeed, ever since the conveyance by Wallach as aforesaid, the said Van Riswick has made extensive repairs and improvements upon the property in good faith, and in a full belief of his title, and that the conveyance was binding upon the heirs of the said Wallach; that there is no personal estate of the said Charles S. Wallach to constitute a primary fund for the satisfaction of any part of said indebtedness, and that the real estate aforesaid constitutes the only fund for the satisfaction of creditors, and that the said complainants, as heirs at law of Charles S. Wallach, are chargeable to the extent of the real assets in hand for the indebtedness of their ancestor. The cross-bill concludes with a prayer for an accounting and for the appointment of a receiver of the rents and profits. The bill covers these facts in considerable detail, which it is deemed unnecessary to repeat in this abstract. Upon the demurrer to his cross-bill the counsel for the heirs contended that they took the estate free from the demands of the creditors of the ancestor, unless secured by pre-existing liens upon the property. The court, however, were of opinion that they took as heirs, and subject to the debts which their ancestor had created previous to the act for which the estate was confiscated. The exceptions to the answer and the demurrer to the cross-bill were therefore overruled.

Decree accordingly.

Albert Pike, Robert W. Johnson, and Luther H. Pike, for the heirs of Wallach.

Durant & Hornor and Lambert & Darlington, with whom was *R. T. Merrick*, for Van Riswick.

Hitz v. National Life Insurance Co.

JOHN HITZ ET AL., ASSIGNEES OF GEORGE MAT-
TINGLY, v. THE NATIONAL LIFE INSURANCE COM-
PANY OF THE UNITED STATES OF AMERICA ET AL.

EQUITY.—No. 4049.

A resale of property embraced in a trust deed made under order of the court will be confirmed, although the party who holds the notes is the purchaser for a sum less than the amount due, there being no other bidder, provided the sale were fairly and honestly conducted.

STATEMENT OF THE CASE AND DECISION.

Exceptions to sale by trustee.

The trust deeds were executed in August, 1872, upon four lots in square 371, located on the north side of K street, in the city of Washington, to secure the sum of \$41,000 to the National Life Insurance Company, payable in five years, with interest at ten per centum semi-annually, with power of sale in default of payment of either principal or interest. The defendants Rollins and Chandler were the trustees. The deed of trust was made by one Gilbert, who conveyed to George Mattingly, and the latter conveyed to the complainant by voluntary assignment for the benefit of creditors.

Default having been made in the payment of interest, the trustees advertised the property for sale, and the same was struck off to the insurance company. The recent bill was filed by the complainants to vacate these sales, and at the special term, July 21, 1875, a decree was passed setting the sales aside with costs.

From this decree the defendants appealed, and on February 12, 1876, the decree of the special term was affirmed, with leave to the complainants to pay the interest due within ninety days; upon default in paying the interest within the time limited, the property to be sold by trustees to be appointed by the justice holding the special term, and the cause was remanded for further proceedings under this decree.

The interest not having been paid within the time limited,

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the defendants, on the 6th day of June last, filed a motion in the court below for the appointment of trustees to sell the property. This motion was heard on the day it was filed, and, after argument, a decree was passed appointing the defendants Rollins and Chandler to resell the property.

The property was again knocked down to the insurance company, one of the defendants who held the notes. The complainants filed exceptions to the report of the trustees of the sales because there was only one bid, and that made by the party secured by the trust deeds, and also because the property was sold for an inadequate price. It ought also to be stated that the same objections were alleged in the bill against the first sale. On August 1, 1876, a decree was passed overruling these exceptions and confirming the sale. From this decree the complainants appealed. The court in general term affirmed the decree, holding that the decree directed the trustees to sell the property at public auction, that the sale appeared to have been fairly and honestly conducted, and the prices, in view of all the testimony, were not of such an inadequate kind as to justify the interference of a court of equity.

Edwards & Barnard, for complainants.

Frank W. Hackett, for defendants.

The United States v. Boutwell.

THE UNITED STATES, ON THE RELATION OF GEORGE
F. WORK, v. GEORGE S. BOUTWELL, SECRETARY
OF THE TREASURY.

AT LAW.—No. 8694.

- I. A writ of mandamus will not be issued by this court to compel the Secretary of the Treasury to draw his warrant for the payment of money when the act involves the exercise of judgment or discretion.
- II. This court will not compel the Secretary of the Treasury, by a writ of mandamus, to draw his warrant upon the Treasurer for the payment of money unless there has been a specific appropriation for the particular claim, and a direction by Congress for its payment.

STATEMENT OF THE CASE.

This is a proceeding instituted by petition for a writ of mandamus to compel the Secretary of the Treasury to pay to the relator a certain amount of money found to be due to the latter from the United States.

The petition sets forth that in 1863, by a charter-party or contract in writing, Work chartered a steamboat to the War Department for use as a transport in the military service, covenantee in the charter-party that the government should assume the war risks and pay the owner the value of the vessel if it happened to be destroyed by the contingencies of war incident to its employment, and that the owner should assume the marine risks. The vessel having caught fire, was blown up in the Potomac River by order of the military authorities. The petitioner thereupon, in accordance with law, presented to the Third Auditor of the Treasury his claim against the United States for the value of the vessel. The Third Auditor allowed the claim to the extent of \$8,200, and the Second Comptroller confirmed the award. The Secretary of War—to whom, as the head of the department against which the claim arose, the balance was then certified by the Second Comptroller—approved the decision, and drew his requisition on the Secretary of the Treasury for the amount, to be paid out of the funds in the Treasury appropriated to

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the support of the War Department. The Secretary of the Treasury refused to honor the requisition.

The respondent, in his answer or return to the rule served on him to show cause why the writ should not issue, sets up a plea denying the jurisdiction of the court and its right to control him as an executive officer of the government; that the matter of drawing a *warrant* for the amount of the award is a matter involving judgment and discretion; that, under the law, he has the right to return the papers to the auditing officer with his objections, or send it to the Court of Claims for adjudication; and that he holds the case under advisement for such disposal of it, and he claims the right of reviewing the decision of the auditing officers, and of absolutely refusing to allow the claim or draw his *warrant*, if he considers the claim unfounded.

The case has been certified up to be argued in the general term in the first instance.

George Taylor, M. F. Morris, and F. C. Wood, for petitioner, presented the following points:

1st. This honorable court has jurisdiction in this case. The act the performance of which is sought to be enforced by the writ of mandamus, is merely a ministerial duty affecting an individual right, and does not admit of the exercise of judgment or discretion on the part of the honorable Secretary of the Treasury. This court, therefore, has jurisdiction and authority to compel him to perform that act and to issue his *warrant* for the payment of the claim on the requisition of the Secretary of War. (*Marbury v. Madison*, 1 Cr., 137; *Kendall, Postmaster-General, v. The United States*, 12 Pet., 527; *State of Mississippi v. Johnson*, 4 Wall., 498; *Gaines v. Thompson*, 7 Id., 353; *Secretary v. McGarrah*, 9 Wall., 312; *Reeside v. Walker*, 11 How. R., 272; *Smyth's case*, 5 Nev. & Man. R., 589; 6 Id., 509.)

2d. This is a claim against the War Department for loss or expenditure incurred in that department, and was properly presented to the Third Auditor, *certified to* and approved by

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the Second Comptroller, and the *balance* found to be due *certified* by the said Comptroller to the Secretary of War, who approved of the settlement and issued his requisition on the Secretary of the Treasury for the payment of the claim out of an appropriation subject to his requisition and unexpended. These acts were in accordance with the acts of Congress providing for the settlement and payment of such claims. And this settlement of the accounting officers is final and conclusive on the executive branches of the government, and cannot be changed or modified by the Secretary of the Treasury. No discretion is left in that officer as to the correctness of the settlement. (Act September 2, 1789, 1 Stat., 65; act March 3, 1817, 3 Stat., 366; act May 7, 1822, 3 Stat., 689; act March 3, 1849, 9 Stat., 414; act March 3, 1863, 12 Stat., 743; act of 1866; act of March 30, 1868, 15 Stat., 54.)

3d. Independent of the acts of March 30, 1868, and June 25, 1868, neither the Secretary of the Treasury, nor even the head of the department to whom such claims were required by law to be certified, had any discretion—as claimed in the answer of the honorable Secretary of the Treasury in this case—in the matter of drawing his warrant or requisition, but was compelled in the performance of his duty under the law, as it stood prior to these acts, to issue the same. (Act September 2, 1789, 4 Stats., 65; act March 3, 1817, 3 Stats., 366; opinion of Attorney-General Wirt of October 20, 1823, Opinions of Attorneys-General, 471, 475; Id., 479, 506, 528; opinion of Attorney-General Taney of April 5, 1832, Opin's, 871, 872; act March 30, 1868, 15 Stats., 54; report of committee, 3d sess., 40th Congress, Report No. 26, made February 15, 1869.)

4th. By the act of March 30, 1868, section 1, (15 Stats., 54,) Congress declared this to be the true construction of the law, and, instead of giving such discretion to the honorable Secretary of the Treasury, expressly declares that he shall not have such discretion, and makes the settlement of the accounting officers final and conclusive, and beyond the control of the heads of departments. Nor does the proviso of this act

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authorize the Secretary of the Treasury to exercise any discretion or judgment in the matter, or to submit the case to the Comptroller for review. Nor does the seventh section of the act of June 25, 1868, (15 Stats., 76,) give to the honorable Secretary of the Treasury any discretion or authority to refer the case to the Court of Claims. (*Delaware River Steamboat Co. v. The United States*, 5 Nott & Huntingdon, 55.)

George P. Fisher, for respondent.

1. Independently of the act of Congress of March 30, 1868, (15 Stats. at Large, p. 54,) and independently of act of June 25, 1868, (Id., p. 76,) the Secretary of the Treasury is not subject to the jurisdiction of this court; because the drawing of a warrant is in the line of the general duties of his office, in regard to the discharge of which he is not subject to the control of the court. (*Decatur v. Paulding*, 14 Pet., 515.)

2. By the act of March 30, 1868, the Secretary of the Treasury may submit to the Comptroller any facts in his judgment affecting the claim for the review of the Comptroller; and whether he will do so or not is a matter of judgment and discretion.

3. By section 7 of the act of June 25, 1868, the Secretary of the Treasury may transmit a claim of the class of the one under consideration, with vouchers, &c., to the Court of Claims for adjudication there; and whether he will do so or not, or whether he act under the statute of March 30, or the statute of June 25, 1868, is a matter involving judgment and discretion.

Mr. Justice HUMPHREYS delivered the opinion of the court:

The petitioner asks this court for a writ of mandamus to compel the Secretary of the Treasury of the United States to draw his warrant on the Treasurer for \$8,200 in favor of the petitioner, the same being a sum of money for which the Secretary of War made requisition on the Secretary of the Treasury, to be paid out of the funds appropriated to the sup-

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port of the War Department; but there has been no specific appropriation for this particular claim.

The nature and character of the writ presupposes, before its issuance, a final, definite judicial determination in favor of the party applying, leaving nothing to be investigated to establish the correctness and justice of petitioner's right of redress. (6 Bacon Abr., 418.)

In *Reeside v. Walker*, 11 Howard, 272, the Circuit Court of this District declined to issue a mandamus to the Secretary of the Treasury to pay over money, and the Supreme Court affirmed the judgment.

The duty and office of the Secretary of the Treasury in drawing warrants, except in instances specified, defined, and already ascertained by direct act of Congress, can scarcely be said to be purely ministerial, leaving no judgment to be exercised, and stripping him of all discretion.

There is no other head of any other department who is responsible for the orders which draw the money directly from the Treasury. Nor can he legally draw any therefrom except in pursuance of appropriation made. If he mistakes, and supposes that an appropriation has been made, when, in fact, he has wrongly construed the act of Congress on that subject, he would be liable and answerable for such mistake. Hence there is necessarily a discretion of judgment to be exercised by him even in these instances. And so the Supreme Court determined in *Decatur v. Paulding*, 14 Peters, 497. Chief Justice Taney delivered the opinion of the court in that case, and on the subject of the functions of the heads of the departments said:

"In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is required to act."

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The same general principles were stated by the court, Justice Miller delivering the opinion, in *Gaines v. Thompson*, 7 Wallace, both as to injunction and mandamus. The case of *Kendall v. The United States*, 12 Peters, taken and considered with subsequent expositions, eliminations, and expurgations by the same tribunal, may be relied upon as the received doctrine, and as defining the class of cases where the court will take jurisdiction and where decline. Subsequent rulings reduce the determination in the case of *Kendall* to the following limited compass:

“The act required to be done by the Postmaster-General is simply to credit the relators with the full amount of the award of the Solicitor. This is a precise, definite act, purely ministerial, and about which the Postmaster-General had no discretion whatever. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise.”

This was the language used by the court in *Kendall's* case, and it has since been stated by the court to have been the ground on which the jurisdiction was placed. In *Marbury v. Madison*, Chief Justice Marshall said:

“It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined.”

Has any act of Congress authorized any one else, any officer, high or low, than the Secretary of the Treasury, to draw money from the Treasury? Can any court order money to be drawn therefrom? Has any act of Congress conferred upon any court the power to order it? Courts may, in proper cases, determine that a claim exists against the government, but there the power of the courts over the store-house of the nation ceases. But can the mandate of this body be legally issued to the custodian of the warrants of the government

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requiring him to respond to the requisition of the head of another department of the government, and, willing or unwilling, in accordance with his judgment or against his judgment, require him to pay up? Or has the Secretary of the Treasury any discretion left, or any judgment to exercise in the performance of this duty? Is the act or are the acts of Congress imperative, direct, and explicit in the case; and is nothing left but to do this or be answerable to the court? If not, the writ should issue; if something else is left, and can reasonably be done, then the writ should not issue. The petitioner may appeal to Congress, because this is an alleged claim against the government. If it is just, that power will order it paid; if not, it must fail. The money will still be in the Treasury; if taken out now by our order, it will never find its way back. Let us look more closely into the case of *Marbury v. Madison*, and see to what point the rights of the petitioner had arrived. The President had nominated, the Senate had advised and consented to the appointment, commissions had been signed in due form by the President, and the seal of the United States had been affixed to the said commissions by the Secretary of State, and now nothing remained but to deliver them. The whole question had passed from the control of the executive department; neither the President nor any head of a department had any longer any control over the subject at all; the right had, as the court determined, vested. The question could not be reviewed by the President himself, nor by any head of any department. The ground could not be gone over; the determination was absolute and final, and irrevocable. Have the relations of the executive departments and their duties, and the judicial department and its control, been changed or altered by any act of Congress?

We think they have not. The act of June 25, 1868, (15 Stats., 76,) does not change the relation of any other department to the judicial, nor does it enlarge the jurisdiction of the courts of law or equity. Then we must fall back upon the line long since established and marked out for the judi-

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cial branch, else we throw the whole force of the government into confusion by collision of different branches. The act of Congress of the United States of June 25, 1868, was intended and designed—as it expressly provides—to regulate the action of heads of departments in their intercourse with the Court of Claims, and it goes no further. What does the act of Congress of March 30, 1868, accomplish or require to be done? It explains, interprets, and directs that the act of March 3, 1817, shall not be taken “to authorize the heads of departments to change or modify the balances that may be certified to them by the Commissioner of Customs or the Comptroller of the Treasury, but that such balances, when stated by the auditor,” &c., shall “be subject to revision only by Congress or the proper courts.” Now, pause to see where the court itself stands in the face of this act, in the exercise of the power, legally, to issue the writ of mandamus. This writ must not be called into requisition if any other proceedings can be had. But here is an express provision that the matter of revision may be had by “Congress or the proper courts.” In the case of *Kendall*, Congress, the last resort, the final arbiter within its constitutional limits, had acted, had specifically directed a certain, definite piece of clerical, ministerial work to be done—no doubt of the construction of what was required; and what was required to be done by the act was within the bounds and limits of the constitutional powers of the legislative department. Had Congress transcended constitutional bounds, the court could have controlled its action. The act of July 28, 1866, section 8, (14 Stats. at Large, 327,) amends section 4 of act of March 3, 1849, by providing: “That the said auditor shall in all cases transmit his adjustment, with all the papers relating thereto, to the Second Comptroller for his revision and decision thereon, the same in all respects as is provided in the act of the 2d of September, 1789.” What was the act of March 3, 1849? (9 Stats. at Large, 414.) It was “an act to provide for the payment of horses and other property lost or destroyed in the military service of the United States.” This act had been amended

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on March 3, 1863, in section 2, by providing by section 5: "That section 2 of the act of 1849 should be construed to include steamboats and other vessels, &c., in the property to be allowed and paid for when destroyed and lost under the circumstances provided for in said act." The act of 1849, amended as stated, provided in the second section for the payment of property lost or destroyed in the service of the United States, "except in cases where the risk to which the property would be exposed was agreed to be incurred by the owner." The third section of said act provides that such claims shall be adjusted by the Third Auditor, under such rules as shall be prescribed by the Secretary of War. The claim in controversy grows out of an alleged destruction of a steamboat or tug, and the Third Auditor of the Treasury allowed the claim, after adjustment, and transmitted the same to the Second Comptroller of the Treasury, which was adjusted and allowed by him; and being approved by the Secretary of War, a request was made by the said Secretary of War to the respondent, the Secretary of the Treasury, to draw his warrant for \$8,200 in favor of petitioner.

The Secretary of the Treasury refused to draw his warrant on the ground that, in his opinion, the United States was not bound to pay, under the contract with the owner, for the vessel or steam-tug, she having been destroyed by fire, the risk of which, the Secretary alleges, the owner took upon himself—that being the contract as evidenced by the charter-party of affreightment.

It may be broadly asserted and legally maintained that it does not rest within the jurisdiction of any court by any process to compel the Secretary of the Treasury to draw money from the Treasury, nor to compel him to draw his warrant in favor of any one, nor to sign the same and deliver it to any one, for a controverted claim.

The second section of the act of September 2, 1789, entitled "An act to establish the Treasury Department," contains this clause:

"That it shall be the duty of the Secretary of the Treasury

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* * * to decide on the forms of keeping and stating accounts and making returns, and to grant, under the limitations herein established, or to be hereafter provided, all warrants for moneys to be issued from the Treasury in pursuance of appropriations by law.”

The Constitution has carefully confined the power over all the property of the government in the legislative department, and the legislative department has attached to the office of the Treasury the entire custody of the moneys of the government, and has confided to the Secretary thereof in his official capacity the sole power to draw warrants, not as a ministerial act, but as an officer of the government in his official capacity, and has intrusted to his judgment and discretion when and in what sums to draw; for he could draw upon New York, New Orleans, and San Francisco to liquidate claims in favor of the same individual. The necessities of the government might require this to be done.

He is expected so to use his judgment and discretion in drawing those warrants as that the credit of the government shall not suffer, and he must be left free of the mandates of any but the legislative department. In the case of *Decatur v. Paulding*, 14 Pet., Chief Justice Taney says:

“Now, can the court, by mandamus, act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary exercise of his official duties? * * * The interference of the court with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them.”

This language was quoted and approved by the court in the case of *Guines v. Thompson*, already cited.

It is difficult to conceive of an official duty depending upon discretion and judgment more than that of drawing warrants upon the Treasury, and of the proper adjustment and distribution of the moneys in the Treasury, the disposal of which has been very wisely reserved to the power that raises that money,

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and to the special officers to distribute it under the sole supervision of that power. It is to be perceived that whenever the legislative department shall see that the interest of the country and the rights of individual citizens demand the aid of the courts to control the Treasury, the jurisdiction of those courts will be extended. We think that it would be profitable to examine, as a legal question, into the principles enunciated in the opinion of the learned judge who delivered the opinion in the case of *Brashear v. Mason*, 6 How. Mr. Justice Nelson delivered a well-considered opinion in that case, and an extract or two from the same will exhibit the reason why a court cannot enter the Treasury by its order:

“Formerly, the moneys appropriated for the War and Navy Departments were placed in the Treasury to the credit of the respective secretaries. That practice has been changed, and all the moneys in the Treasury are in to the credit or in the custody of the Treasurer, and can be drawn out, as we have seen, only on the warrant of the Secretary of the Treasury, countersigned by the Comptroller. It will not do to say that the result of the proceeding by mandamus would show the title of the relator to his pay, the amount, and whether there were any moneys in the Treasury applicable to the demand; for, upon this ground, any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and the proceeding by mandamus would become as common in the enforcement of demands upon the government as the action of *assumpsit* to enforce like demands against individuals.”

In the case of *United States v. Guthrie*, 17 How., the court uses this language:

“Whether, under the organization of the Federal government, or by any principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims

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against the United States? * * * It would occur to every mind that a treasury not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government, under such a *regime*, or, rather, under such an absence of all rule, would, if practicable at all, be administered, not by the great departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain and, perhaps, contradictory action of the courts in the enforcement of their views of private interest."

Mr. Justice Daniel delivered the opinion of the court in the case just cited, and in the opinion Chief Justice Taney, Justices Wayne and Catron concurred; while Justices Curtis, Nelson, Grier, and Campbell assented to the judgment denying a mandamus against the Secretary of the Treasury, but expressed no opinion on the views quoted, and Mr. Justice McLean dissented from the opinion and judgment and delivered a separate opinion. Whilst the five learned justices had their doubts as to the propriety of announcing an adjudication abandoning all jurisdiction by the courts to interfere with the executive departments acting in their official capacity, yet four of them did not dissent from the views of their four learned brethren. The case of Guthrie went up from the Circuit Court of this District, by which court the application for mandamus had been overruled, and was decided by the Supreme Court at the December Term, 1854. The case of *United States v. Seaman*, 17 How., declares the law to be that the writ of mandamus cannot issue where any discretion and judgment are to be exercised. The history of our country in these subsequent years has fully exhibited the wisdom of the different branches of our government being left untrammelled by any interference on the part of another branch. The excellence of our system may consist greatly in the strict

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observance of each branch adhering to its own peculiar limits and bounds, thereby preserving the law of harmony and the harmony of law and order. The motion for the writ is overruled and discharged.

CHARLES E. HOVEY AND WILLIAM P. DOLE v. AUGUSTINE R. McDONALD AND WILLIAM WHITE.

EQUITY.—No. 3937.

- I. A sum of money had been paid out of a fund in the hands of the receiver under the order of the special term, which order was afterwards set aside and vacated at the general term, and the defendants ordered to pay back the said sum of money to the custody of the clerk of the court; and having failed to comply with that order, they were declared to be in contempt.
- II. As a general rule, where it is sought to bring a party in contempt for disobedience to an order of the court, personal service of the motion should be made upon the party instead of the solicitor or counsel; but if the party flees the jurisdiction, he will not be permitted to prosecute or defend his suit until he purges himself of his contempt.

STATEMENT OF THE CASE.

An order was made at the special term, sitting in equity, on the 28th of June, 1875, directing the receiver, George W. Riggs, to pay to the defendants the sum of \$47,297.56 in gold out of the fund belonging to the suit in his hands, which payment was accordingly made. On the 5th of May, 1876, a motion was made by complainants for a rule upon the defendants requiring them to deposit in the custody of the court the said sum of money which had been so paid to them by the receiver, and that application was transferred by order of the special term to be heard at the general term in the first instance; and on the 19th day of June, 1877, the court in general term passed an order vacating that of June 28, 1875, and directing the defendants to pay back into the registry (or clerk) of the court the sum which they had received from the

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receiver. A copy of this order was served upon the defendant William White personally, on June 28, 1877, at his place of business in the city of Cincinnati and State of Ohio, and a like copy was served upon McDonald, the other defendant, by leaving the same in the city of Washington at his last place of abode, he having left the city. The defendants having failed to comply with the order, an application is now presented that each of them show cause why they should not be punished for disobedience, in failing to pay the said money into the registry of the court, as for a contempt.

Durant & Hornor, for complainants.

No appearance for defendants.

Mr. Justice OLIN delivered the opinion of the court:

At the last term of this court a motion was made by the plaintiffs against the defendants, that the latter be ordered to pay back to the clerk of this court the sum of forty-seven thousand dollars, or thereabouts, which it was alleged had been illegally ordered to be paid over by the clerk to the defendant McDonald. That motion was fully argued by counsel for the respective parties, and upon full consideration of the case, an order was made to return that amount of money to the custody of the clerk of this court.

It is wholly unnecessary to inquire whether the order for the return of the money was rightfully or wrongfully made; it is sufficient to say that said order must be obeyed, unless reversed or set aside by proceedings instituted for that purpose.

The defendants having failed to comply with that order, this motion is instituted for the purpose of proceeding against them for contempt.

An attempt was made to serve the same on McDonald, who, upon diligent inquiry, could not be found. Inquiry was made upon his solicitor and counsel, who seemed to be wholly unable to give any information upon the subject.

An attempt was then made to serve a copy of the moving

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papers upon the solicitor and counsel of the defendants, but they declined to receive or admit service.

As a general rule, where it is sought to bring a party in contempt for disobedience to an order of the court, personal service of such motion should be made upon the party, instead of the solicitor or counsel; but if the party flees the jurisdiction of the court after he has contemned and disobeyed its orders, he cannot be permitted further to prosecute or defend his suit until he purges himself of his contempt. To hold otherwise would render the court more in contempt than he who contemns its authority.

Where the court cannot obtain by its process control of the person of the litigant, we know of no other way to secure obedience to its authority than by the manner of conducting the proceeding before the court; and in this light the order proposed seems eminently proper, and justified by numerous authorities not necessary here to be cited.

GEORGE F. RIDER v. BENJAMIN F. MORSELL.

EQUITY.—No. 4700.

- I. The defendant obtained judgment against a firm of which complainant was a member, and it has been paid and satisfied. Afterwards, in 1858, he obtained another judgment on a different cause of action against complainant alone, upon which there has been a *scire facias*, and judgment in favor of defendant. The defendant obtained still another judgment against complainant in 1864, which has also been paid and satisfied. The complainant now claims that the payments made on the two judgments that have been satisfied should be credited on the judgment of 1858. The defendant denies this. The complainant's proofs are not satisfactory, and he not having accounted for his delay in asserting his claim, the court, under these circumstances, will not enjoin the proceedings on the *scire facias*.
- II. A payment of the judgment of 1858 would constitute a complete defense for the complainant upon the trial of the *scire facias* at law. But no such defense was set up in the case, and it is therefore impossible that a court of equity should afford him the relief of injunction.

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STATEMENT OF THE CASE.

From the record in this case it appears that the defendant obtained two judgments at law against the complainant Rider—one in 1858, for \$375, and one in 1864, for \$300. The latter has been satisfied, and the former not. It also appears that Morsell, in 1857, had obtained a judgment against Rider jointly with one White, composing a firm of Rider & White, for the sum of \$254, which has also been paid and satisfied. The complainant claims, in his bill in this case, that the amount in the judgment of 1864 of \$300 had been previously included in the judgment of 1858 for \$375, and that the payment on the judgment of 1857 should also be credited upon said judgment. The court hold that the complainant's testimony is confused and unsatisfactory.

The defendant Morsell has issued a *scire facius* upon the judgment of 1858, which remains unsatisfied, and judgment thereon has been rendered in his favor. The bill is filed to restrain proceedings upon the judgment last mentioned, and for general relief. The case was heard on pleadings and proofs, and a decree passed dismissing the bill. The case is now here upon appeal from that decree.

B. A. Lockwood, for complainant.

M. F. Morris, for defendant.

Mr. Justice WYLLIE delivered the opinion of the court:

The object of the bill in this case is, that the defendant may be enjoined from collecting a judgment obtained by him against the complainant in 1858 for the sum of \$375, with costs. Execution was duly issued upon the judgment within the year and day, and other executions were regularly issued from time to time, and all returned *nulla bona*, until 1875, in which year a *scire facius* was issued and judgment rendered against the defendant; so that the judgment remains now in full force.

In 1857 defendant had obtained a judgment against the

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firm of Rider & White, of which firm complainant was then a member. This judgment was for \$254, and was collected from White by execution in 1859.

Complainant now asserts that the proceeds of this judgment ought to have been credited upon the judgment against himself which was rendered in 1858.

The records of these two cases show respectively that the causes of action were different, and that Rider & White were the defendants in the first case, and Rider alone was defendant in the second. After the judgment was obtained in the first case against the firm, the second action was brought for a different cause against Rider alone, and he made no pretense at the time, nor at any time afterwards until recently, that satisfaction of the earlier judgment would entitle him to a credit on the second. His own testimony on the subject is most confused and unsatisfactory, and is squarely confuted by that of the defendant. The record is against him as well as all the probabilities, and his own laches is unaccountable, if his statement in this case be true. His conduct, as a reasonable man, during this long period, is irreconcilable with the truth of his present statement, and he mistakes the creations of fancy for facts in his memory.

The bill further states that in the year 1863 defendant obtained another judgment against complainant for \$390.90, which was collected from him under execution; and this, also, he claims that he is entitled to have credited upon the judgment of 1858.

But this claim on his part is wholly without support in either the evidence or the record. Had the cause of action in this last case been the same as that contained in the action of 1858, it was his duty to himself to make the defense at the proper time. The record shows that the causes of action in the cases were different respectively. Admitting these petitions of complainant, however, to be true in point of fact, he is now seeking relief in the wrong forum. On the very day on which the execution under the judgment of 1864 was issued, a writ of *scire facias* was issued to revive the other

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judgment—that of 1858, the judgment now in question. He paid the judgment of 1864; that of 1857 had been previously paid by his partner, White. He claims that both of these payments ought to have been credited on the judgment of 1858 as payments. If that was so, it would have been a complete defense for him against the *scire facias* at law. But he set up no such defense in that case, and judgment was rendered against him by default.

Were the claims set up by this complainant sustained by evidence much more weighty than that in the present record, it would be impossible that a court of equity should afford him the relief he seeks. These considerations dispose of the case.

A number of other incidental and minor questions were argued which could not affect the result, and which, for that reason, are passed over without further observation.

Decree affirmed.

MARGARET ELLER v. GEO. BERGLING, EMIL SCHAW-
ACEFF, NICHOLAS HAPP, HENRY BERGLING, HENRY
NOEL, AND JOSEPH BISHOP.

EQUITY.—No. 5079.

Where parties are exceedingly numerous, and it would be impracticable to join them without very great delay, and would obstruct and defeat the ends of justice, a court of equity will dispense with them, especially when they are members of an unincorporated association, and the officers thereof have been made defendants.

STATEMENT OF THE CASE.

The complainant filed her bill for the purpose of compelling the defendants and the other members of a certain voluntary unincorporated association doing business in the city of Washington, and known as "The German Roman Catholic St. Joseph's Liebes-Bundes," to pay to her an amount of money equal to as many dollars as there were members there-

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of at the time of her husband's death, to wit, on the 1st day of September, 1875.

The bill alleged that the defendants were the officers of said association, and that the members thereof were exceedingly numerous, to wit, about two hundred and fifty, many of whose names and addresses were not known to complainant, and it would be impracticable to make them parties to this suit without almost interminable delays and other inconveniences which would obstruct and probably defeat the purposes of justice; that the husband of complainant was for about fifteen years before, and at the time of his death, a member of said society in good standing, and at his decease the complainant, as the widow and entire family of her said husband, became entitled, under the constitution and by-laws of said association, to receive from the defendants and each and every other member the sum of one dollar.

The bill prayed for a discovery in respect of a number of members, and that the defendants be required to pay or cause to be paid to complainant the money aforesaid, and for general relief.

The answer of the defendants substantially admitted all the allegations of the bill, with the exception that, instead of two hundred and fifty members as alleged, there were only two hundred and fourteen. The answer assigned as a defense that a resolution was passed by a majority of the members present at a meeting of said association, declaring that the proximate cause of the death of complainant's said husband were blows and kicks inflicted by the complainant; that there was no privity of contract between defendants and complainant; that though she might have an interest in the subject of the suit, she had no right to call upon the defendants respecting it; and that all persons materially interested in the suit have not been made parties.

All the testimony in the cause was introduced on behalf of the complainant, and tended to show the amount of money the complainant was entitled to.

No testimony was offered by the defendants. After argu

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ment, the court below, at the January special term, 1877, decreed that the defendants, or the proper officers of said association, pay complainant two hundred and fourteen dollars, with interest from September 1, 1875, and costs of suit, out of any moneys, credits, or property of said association, and that she have execution therefor; and from this decree the defendants appealed.

E. A. Newman, for complainant, claimed:

First. That the court had jurisdiction. (1 Story's Eq. Jur., sec. 71; *Russell v. Clark's Executors*, 7 Cranch S. C. Rep., 69.)

Second. That all the necessary and proper persons had been made parties. (1 Story's Eq. Pl., secs. 77, 92, 94, 107, and 116, p. 100, note 4; *Langdale v. Langdale*, 13 Ves. Jr., 167, note 2; *Attorney-General v. Jackson*, 11 Ves., 365, and note 1, p. 372; *Cullen v. Duke of Queensbury et al.*, 1 Brown's Ch. Rep., 101; *West v. Randall*, 2 Mason, 194, 195; *Wiscr v. Bluchly*, 1 Johns. Ch. R., 437; *Elmendorf v. Taylor*, 10 Wheat., 166; *Executor's of Brasher v. Cortlandt*, 2 Johns. Ch. Rep., 247.)

Third. The majority have no right to bind the minority. (*Lloyd v. Loring*, 6 Ves. Jr., 773; *ex-parte Lacey*, 6 Ves. Jr., 628.)

L. G. Hinc, for defendants, insisted:

First. That it was necessary that all the members of said association should have been made parties, and therefore the court had no power to pass a decree affecting the interest of the absent members.

Second. Complainant had no equitable lien. There was no fund to which it could have attached.

Third. The words "family" and "widow" are not synonymous, nor even convertible, terms. (See Webster's Dic.; Bouv. Law Dic.)

Fourth. Defendants cannot be considered as trustees.

Fifth. No privity of contract between complainant and defendants.

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Sixth. The minority is bound by the will of the majority.

Seventh. This court cannot grant relief without making a contract to which one of the parties refuses assent.

Mr. Justice WYLIE announced that he had been instructed by the court to say that the decree below was to be affirmed.

CARTTER, C. J., said, orally, that it appears from the facts in this case, that, for a long time previous to his death, the complainant's husband was a member of said voluntary association, and that he was a member in good standing at the time of his death; that, therefore, his widow became entitled to the money claimed, unless a legal reason was shown to determine the contrary. The pleadings and proof fail to disclose any such reason. The pleadings and proof fail to disclose any such reason. The proper and necessary persons have been made parties, and the equities of the bill demand an affirmance of the decree below.

HUMPHREYS, J.—I would not consent to a dismissal of the bill. I am of opinion that there are equities in the bill, and therefore concur in the judgment of the court.

Decree below affirmed.

Mr. Justice OLIN delivered the following dissenting opinion:

I think the decree made in this case at the special term should be reversed; and I will state briefly my reasons for that conclusion.

The defendants against whom the bill is filed are members of a voluntary unincorporated association known as the German Roman Catholic St. Joseph's Liebes-Bundes, (Union of Blessed St. Joseph,) and the bill alleges that the members are exceedingly numerous, to wit, about two hundred and fifty, many of whose names are not known to the plaintiff, and it would be impracticable to make them parties to the suit without interminable delays and other inconveniences. The prayer in the bill is, first, that the defendants may be compelled to truthfully discover and show the entire number of members belonging to said society on the 1st of September,

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1875, and that they may be required to pay or caused to be paid to the plaintiff a sum of money equal to as many dollars as there were members of the association.

The first objection to the decree in this case is, that the suit is not brought against the association, but against certain persons who are styled president, secretary, treasurer, and standing committee.

So far as the disclosure asked for in the bill as to who composed the members of the association, no proceedings whatever were taken to make such members parties to the suit, and the cause proceeded to a final decree, in substance as follows: that the defendant, or the proper officers of said association, pay plaintiff two hundred and fourteen dollars, with interest from September, 1875, and the cost of suit, out of any moneys, credits, or property of said association, and that she have execution therefor.

The second objection to this decree arises from the fact that the sum of one dollar agreed to be paid to the family of a deceased member was not a joint contract on the part of the members of the association to become responsible for any defaulting member's dues, who is unwilling or unable to pay the sum of one dollar on the decease of any member, or the expense of music at his funeral. If the association possessed any joint property, it could not, by any rule of law, be touched in this case; for to do so would make the paying members not only responsible for the sum agreed to be paid by them, but also the guarantors for the payment of the dues which other members of the association are unwilling or unable to pay. The engagement that each member of the association enters into, to pay his dues, is not a joint contract, but a several one, and no member of the association can be held liable for the default of any other member; and lastly, if this were not so, by article 15, section 4, of this association, it is provided that it is the duty of every member to pay the sum of one dollar death money, and ten cents for music, within the first two meetings after the decease of a member; by article 54, section 3, it is provided that a motion to appropri-

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ate a sum of money in excess of twenty-five dollars shall lay on the table one month, and shall only be carried by a two-thirds majority of the members present.

This vote was never obtained, and the construction sought to be given to article 6, section 1, would not avail the plaintiff, for such construction would make it a condition precedent to enable the plaintiff to recover. Article 6, section 1, provides that it shall be the duty of the treasurer to receive all society as well as death moneys, and pay all orders, sick and death moneys, upon formal orders from the secretary, signed by the president and standing committees.

These articles of the association are written in German, and bad German, too. The words in the sixth article, inclosed in brackets, "to collect," are evidently a mistranslation of the article in the original German, and leave it to read, "It shall be the duty of the treasurer to receive," &c. The difference between the duty to receive and to collect is very manifest, especially under articles of association like these. No power could be conferred on the treasurer to collect the dues owing by any delinquent member; he could very readily be empowered to receive all moneys voluntarily paid over to him.

JOSEPH P. PAGE, ADMINISTRATOR WITH THE WILL
ANNEXED OF ESTATE OF ROBERT C. PAGE, v. BER-
NARD BURNSTINE AND THE AMERICAN LIFE IN-
SURANCE COMPANY OF PHILADELPHIA.

EQUITY.—No. 5747.

- I. P, during his life-time, obtained several loans of money from B, one of the defendants, and, as security for these loans, assigned an interest in a policy of insurance on his life. Afterwards P, being unable to pay the premiums on the policy, made an absolute assignment of that policy to B, who continued thereafter to pay the premiums until the death of P, and was treated by the agent of the company as the owner of the policy. Under these circumstances, a court of equity will not decree such assignment to be a mere secu-

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urity for the money advanced, as a consideration for the transfer of the policy.

- II. Where the assignor of a policy of life insurance is dead, the assignee cannot be examined as a witness in regard to the transaction on his own behalf, unless he is called by the other party.
- III. Loose memoranda found in the desk of the assignor after his death are incompetent evidence on the part of the administrator of the decedent, in a suit brought by the latter to set aside the assignment as an absolute transfer of the policy.

STATEMENT OF THE CASE.

The case comes up on an appeal from a formal decree of the Equity Court. The cause was heard on the pleadings and proofs, and the bill was dismissed with costs. The facts, as disclosed by the pleadings and proofs, are substantially as follows:

The American Life Insurance and Trust Company, one of the defendants, issued a policy insuring the life of the decedent, Robert C. Page, in the sum of \$3,000. This policy bears date November 26, 1866.

On the 30th day of September, 1868, Page borrowed from the defendant Burnstine the sum of \$300, and, to secure the repayment of that amount, he executed and delivered to Burnstine an instrument in writing, by which he assigned to him the policy of insurance to the extent of the loan. He next borrowed \$437 from Burnstine, on the 1st day of May, 1871, and then, on the 1st day of December, 1871, he made another loan from him of the sum of \$213. For each of these loans he executed and delivered to Burnstine like instruments of assignment. Each of these assignments was regularly approved by the company. After the last loan, in December, 1871, Page stopped paying the premiums. Thereupon Burnstine paid the premiums. This continued until the 7th day of January, 1873, when Burnstine and Page met in the office of Mr. Cross, the agent, and Page then and there signed and sealed an absolute transfer of the policy to Burnstine. This assignment is on the back of the policy, and was approved by the company. The policy, together with the

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assignment, was delivered by Page to Burnstine. After that date Cross sent the notices of premiums falling due to Burnstine only, and treated him as the owner of the policy. At the time of making the assignment of the 7th of January, 1873, when the parties met in Cross's office, Cross told Burnstine that to save himself he should have the policy assigned absolutely to him. Mr. Page stated that he had no money and could not keep up the premiums, and was willing to make this assignment. From the conversation which passed Cross believes that some money was paid by Burnstine to Page in consideration of the assignment, but he has no idea as to the amount. Burnstine, in his sworn answer, avers that between the 1st of December, 1871, and the date of the assignment he kept urging Page to pay the premiums, and that Page asserted that he could not do so, and insisted that Burnstine should buy the policy outright and take an absolute assignment. He proposed that Burnstine should pay him for the policy the sum of \$1,000, but this proposition was rejected. It was subsequently agreed, however, that Burnstine should pay him the additional sum of \$500, and take an absolute assignment of the policy. This last agreement was carried out by the payment of the money and the delivery of the assignment. Burnstine paid all the premiums from December 1, 1871, until the death of Page, which occurred in November, 1875.

After the death of Page, and on the 11th day of January, 1876, the complainant, as administrator of the estate of Page, exhibited his bill in this court for the purpose of showing that the last assignment to Burnstine, though absolute in form, was executed and delivered for the purpose only of securing to the defendant the repayment of money loaned.

The bill prays an account and an injunction. The bill charges that the assignment was given as a security for the repayment of money, and not as an absolute transfer, and that Page had been paying interest on those loans to Burnstine at the rate of five per centum per month; and that, if a proper account shall be stated, there will be but little, if any-

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thing, due to Burnstine. The bill charges fraud upon Burnstine, in that he claims the whole sum due on the policy and denies that the estate has any interest. It also waives, or seeks to waive, an answer under oath as to Burnstine; but Burnstine answers under oath, and negatives every material allegation of the bill.

To establish the allegation of his bill, the complainant produced an envelope found in the decedent's desk, after his death, with the contents thereof. The envelope contained a will made by Page on the 5th day of July, 1870, and a receipt dated October, 1868, signed by Burnstine, for six drafts or orders on one Bell, drawn by the testator, October 2, 1868, in favor of Burnstine, each for \$50. These drafts were drawn upon Bell as disbursing clerk of the Post-Office Department, and against the monthly pay of the drawer, who was a clerk in that department. They were payable in successive months. The envelope contained also five pieces of paper, upon which Page had made some kind of computations. These computations seem to have been made at about the same time, the latest date mentioned being December 1, 1871. Four of them were made with ink and one with a pencil. Objections to the introduction of this testimony were made, and before the hearing a motion was filed to strike it out. The deposition of Burnstine was taken in the cause.

W. F. Mattingly, for complainant.

The statements in the handwriting of Robert C. Page, deceased, are admissible in evidence. Phillips on Evidence, vol. 1, p. 300, states the rule to be as follows:

"It is a rule of evidence clearly established that declarations of persons since deceased (under which term of declarations all written statements and entries are intended to be comprehended) are admissible, where those persons are to be presumed connusant of the subject-matter, if the declarations *apparently operate against their own interest*, whether pecuniary or proprietary." "Nor does it seem necessary that the declarations should have been made by persons in the course of

any business or employment, or that declarations against interest should be contemporaneous with the facts to which they relate."

The statements offered in evidence in this case were apparently against the interest of the party making them, inasmuch as they admitted certain amounts to be due Burnstine on account of the assignment of this policy. They also show that five per cent. a month interest was to be paid, and it is a remarkable coincidence that a calculation of five per cent. interest per month on the amount due up to the time of the several assignments results in the precise amounts for which Burnstine claims the assignments were made. On the admitted proofs in the case, showing beyond question the necessitous condition of the borrower; his chronic impecuniosity; that the lender was a Jew pawnbroker; that the first pledge of the policy was a loan, and without any proof showing that the defendant paid a single cent for the assignment, it is respectfully submitted that under the following authorities there can be no doubt but that a court of equity should treat the assignment as a mortgage, and not a sale. (*Morris v. Nixon*, 1 How., 118.) When the original proposition was for a loan on the security of the property, and a bond was given for the sum advanced, though the deed was absolute, the grantor must show that the original design of a loan or a security was changed and a sale substituted therefor. (*Russell v. Southard*, 12 How., 151, *et seq.*) Notwithstanding the absolute nature of the conveyance, in doubtful cases the court leans to the conclusion that it was a mortgage, and not a sale. When the debtor is in necessitous circumstances, courts of equity do not consider a consent thus obtained to be sufficient to fix the rights of the parties. The fact that no promise of repayment was made does not make the conveyance less effectual as a mortgage.

"We think that, inasmuch as the mortgagee in possession may exercise an undue influence over the mortgagor, especially if the latter be in needy circumstances, the purchase by the former of the equity of redemption is to be carefully,

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scrutinized where fraud is charged, and that constructive fraud only, or an unconscientious advantage, which ought not to be retained, need be shown to avoid such a purchase."

In the case at bar there is no proof that Burnstine paid anything for the assignment of the equity of redemption, and the proof is ample to show the character of the lender and the necessitous condition of Page. (*Babcock v. Wyman*, 19 How., 296.) In this case the court admitted parol proof to establish the mortgage after more than twenty years' possession by the grantee under a deed absolute on its face. From the authorities cited, with approbation, on page 300 of this report, it is evident that the same rules of law apply to the transfers of personal property. The sale or release of an equity of redemption to the mortgagee will be closely examined, and be set aside if, from inadequacy of price or otherwise, there is reason to suspect that undue influence has been exerted on the mortgagor, or undue advantage taken of his necessitous condition. (*Perkins v. Drye*, 2 Dana, 174; *Hyndman v. Hyndman*, 19 Ver., 9; *Holdridge v. Gillespie*, 2 Johns. Ch., 30; *Villa v. Rodrigues*, 12 Wall., 33.) In this case the court says that all doubts will be construed against the grantee, and likens the sale of an equity of redemption to a purchase of his *cestui que trust*.

• *Enoch Totten*, for defendant Burnstine.

The bill must be dismissed. The material allegations are expressly denied by the answer, and are wholly unsustained by the proofs. The will and the receipt have no bearing upon the case. They were made long prior to the assignment upon which Burnstine relies. The drafts for \$600, receipted for by Burnstine, are produced by him, except one. None of them were paid by Bell.

Where the defendant, in express terms, negatives the allegations of the bill, the averments of the answer must be overcome by satisfactory testimony of two opposing witnesses, or of one witness corroborated by other circumstances and facts which give to it a greater weight than the answer, or

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which are equivalent in weight to a second witness. (2 Story's Equity, sec. 1528; *Alam v. Jourdan*, 1 Vernon, 161; *Pember v. Mathers*, 1 Bro. Ch. R., 52; 2 Madd. Ch. Pr., 443.)

Nor can the plaintiff avoid the force of this rule by waiving an answer under oath. (*Thornton v. Gordon*, 2 Robinson, (Va.) 719.) This case stands on the footing of a case set for hearing on bill and answer. The testimony offered to sustain the bill is worthless and incompetent. The case practically stands, so far as the plaintiff is concerned, upon bill and answer.

The identical question here was before the court last term, in the case of *Hubbard v. Osgood & Stetson*, ante, p. 113. In that case the complainant sought to set aside a sealed instrument of assignment not unlike the instrument here assailed. The subject-matter of the assignment in that case was an "Alabama claim," and the sale was made prior to the treaty of Washington. The court in its opinion says:

"The form of the deed is an absolute transfer of these claims. There is no provision made for repaying the money, and it is admitted that in order to show that the transaction was a loan, the express terms of the instrument must be overruled by the parol statements of witnesses. This kind of proof is admissible, but it ought clearly to show that the contract did not express the intention of the parties. The testimony, we think, is inadequate to establish the fact of a loan.

"The defendants Osgood & Stetson flatly contradict the complainant, and swear positively to the sale. The answer, which is responsive to the bill, denies that it was a loan. A single witness will not be sufficient to overcome the answer of defendant, especially when it is supplemented by their examination as witnesses. The testimony of West, who was examined by the plaintiff, is equivocal. Stetson testifies that on the occasion referred to by West he asked for a special power of attorney, because he had been informed that the complainant was endeavoring to sell the claims over again. We can, therefore, attach no special importance to this cir-

cumstance. West also swears that Stetson spoke of the assignment as a security. It is to be noted that the witness is speaking of a conversation in the office of the complainant, and is, therefore, carefully to be considered and cautiously to be admitted. This is the only circumstance of the case, aside from what the complainant has said, that is entitled to any weight; but the court cannot attach much importance to an acknowledgment coming from a single witness, and which may have been qualified or misunderstood so as to overthrow a written instrument and impeach the pleadings in the case. This would be giving an effect to parol proof which would endanger the integrity of any contract executed for a money consideration."

In the case of *Hubbard v. Osgood* there was a great deal of proof to sustain the allegations of the bill, and the case, in every respect, was a much stronger one than this. The cases, however, agree in this: the thing assigned was of no value at the time of the transfer. Proof is not required to show that this insurance policy was utterly valueless at the time of the assignment, although there is ample proof in the case on that point. In all cases where it is sought to change an absolute deed into a mortgage, "great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold." (*Russell v. Southard*, 12 How., 139.) This court, in commenting upon this point in its opinion in *Hubbard v. Osgood*, says: "The assignment in the present case is a sale of securities, and, at the date of the instrument, these securities were simply claims of doubtful value. There was no certainty that the injuries sustained from the Alabama would ever be recognized or paid by the government. It is a circumstance which we cannot overlook that they had no value, except a speculative one, until a year afterwards."

If there is any wrong established in this case, it rests upon the testator. We know that he borrowed several large sums of money from Burnstine on the security of a policy of insurance, which could be of no value unless the premiums

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shall be paid promptly. After he had borrowed all the money he could get upon it, he promptly stopped paying the premiums, and left Burnstine to get out of his difficulty as best he could. Burnstine adopted the only course left: he carried the burden through by paying out his money. Now this administrator seeks to get the benefit resulting from the expenditure of Burnstine's money, upon the evidence solely of these scraps of paper made by the testator, which do not bear even the poor sanction of his signature.

Mr. Justice OLIN delivered the opinion of the court:

This case comes up on an appeal from a decree of the Equity Court. The cause was heard on the pleadings and proofs, and the bill was dismissed with costs. The facts disclosed by the pleadings and proofs are substantially as follows:

The American Life Insurance and Trust Company, one of the defendants, issued a policy of insurance on the life of the decedent, Robert C. Page, for the sum of \$3,000, the policy bearing date November 26, 1866.

It would seem from the proofs that on the 30th of September, 1868, Robert C. Page borrowed from the defendant Burnstine the sum of \$300, and, to secure the repayment of that amount, he executed and delivered to Burnstine an instrument in writing by which he assigned to Burnstine an interest in the policy of insurance to the extent of the loan; and that he next borrowed from Burnstine, on the 1st of May, 1871, the sum of \$437, and again, on the 1st of December, 1871, he borrowed the further sum of \$213. For each of these loans he executed and delivered to Burnstine an instrument in writing securing to Burnstine an interest in the policy of insurance to the extent of the loans made. Each of these assignments was approved by the insurance company.

After the last loan in December, 1871, Page, the insured, stopped paying the premiums and never thereafter paid anything. The agent of the company notified Burnstine that Page had not paid the premiums, and that the policy would

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be worthless as a security unless the premiums should be paid up regularly.

On the 7th of January, 1873, Burnstine and Page met at the office of Mr. Cross, the agent of the company, and Page then signed and sealed an absolute transfer of the policy to Burnstine. This assignment was on the back of the policy, and was approved by the company. The policy, together with the assignment, was delivered by Page to Burnstine. After that the agent of the company sent the notices of premiums falling due to Burnstine only, and treated him as the owner of the policy. At the time of the meeting of the parties at the agent's office, on the 7th of January, 1873, the agent of the company told Burnstine that, to save himself, he should have the policy assigned absolutely to him, Mr. Page stating that he had no money and could not keep up the premiums, and was willing to make this assignment.

The transaction, as evidenced by the written papers and the testimony of the insurance company's agent, Cross, is perhaps about all the competent evidence given in the case. Burnstine appears, and was sworn as a witness not called by the other party; was certainly not a competent witness in the case; and the same may be said of the loose memorandums and writings said to be found in the desk of the decedent, Page, after his death. They were wholly incompetent, and the case must stand upon the written agreement between the parties, and it is simply this:

Page, the decedent, makes several loans of money from Burnstine, and, as security for the repayment of those loans made, assigns an interest in a policy of insurance on his life. Prior to January 7, 1873, Page, being unable or unwilling to longer pay the premiums on the policy of insurance, made an absolute assignment of that policy to Burnstine, who continued thereafter to pay the premiums upon it until the death of Page.

It is claimed in this case that the absolute assignment of this policy was intended by the parties to be a security for whatever moneys Burnstine had loaned or paid to Page, and

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further, if it was intended by the parties to be an absolute transfer, still a court of equity might decree it to be a mere security for the amount of the loan and the consideration paid for the transfer, upon the ground that Page was a debtor at the time of the transfer and in needy and destitute circumstances; and second, Burnstine was a Jew and a pawnbroker. But we think that all the testimony given in this case—most of which, as we before observed, independent of the written testimony—is by no means sufficient to set aside instruments in writing executed in the most solemn manner in which contracts can be made.

The judgment of the special term must be affirmed.

THE UNITED STATES v. WARD H. LAMON.

AT LAW.—No. 12,549.

- I. In an action for money had and received to the plaintiff's use, the plaintiff cannot recover the money unless he proves that it is against conscience for the defendant to keep it. The burden of showing this is upon the plaintiff. In the absence of proof upon this point, the presumption is that the money was lawfully paid to the defendant, and that he has the right to retain it.
- II. A party sued by the United States cannot set up a claim by way of set-off, unless such claim has been made out with the proper account and vouchers, and presented for settlement at the Treasury Department as required by section 951 of the Revised Statutes; and where the claim is sustained by no evidence except the affidavit of the claimant, it was properly rejected by the accounting officers of the government, and is equally inadmissible as evidence on the trial of the case in court.

STATEMENT OF THE CASE.

This was an action to recover the amount of two checks, dated on the 23d of December, 1861, each for the sum of \$1,000, drawn on the Assistant Treasurer of the United States at New York, by Lieutenant J. D. Devin, acting quartermaster, and which checks were afterwards paid to the de-

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fendant. The object of the suit is to recover the amount thus paid, together with interest from the date of such payment. The declaration contains the common money counts, and the defendant pleaded the general issue.

At the trial of the cause the plaintiff introduced the checks as set forth in the opinion, and rested without any further evidence.

The defendant was permitted to prove that, having received authority from the Secretary of War to raise and equip a regiment of Virginians, and to muster them into the service of the United States, he furnished his own money in raising, equipping, and maintaining the said troops; that the sum thus expended was \$23,000, which has never been repaid to him in whole or in part; that, having expended all his own means, the defendant applied to said Devin for funds to pay for meat for the support of the recruits, and received the two checks in suit, and applied the same exclusively to the payment of such bills, and did not use any part thereof for his own use and benefit. He also introduced a certified copy of an affidavit made by himself, and which he had presented to the Secretary of the Treasury, stating the account in his favor against the United States, for the said sum of \$23,000 expended by defendant in maintaining the troops aforesaid, the same being unaccompanied by any itemized account or vouchers in support thereof, and which claim had been rejected by the auditing officers of the department, on the ground that they had no jurisdiction of the counter-claim of the defendant, that it was not supported by vouchers, and was debarred by section 3489 of the Revised Statutes, p. 695. To this evidence there was an exception by the plaintiff.

After the testimony was concluded the plaintiff asked the court to instruct the jury that the defendant was not entitled to set off against the plaintiff's claim any amount expended by him prior to the date of the checks, because an itemized account supported by vouchers was not presented for allowance or disallowance, as required by law, nor was the claim presented *within the time required by law*.

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Which instruction the court refused to give, but did instruct the jury, in substance, that the defendant was not by law required to present his said account to the accounting officers of the United States; that the laws of the United States in relation to presenting set-offs to accounting officers did not apply to this transaction. And if the jury believed from the evidence that the checks were delivered for the purpose of paying for said supplies and subsistence of persons who were thus mustered into the military service of the United States, and were paid out by the defendant for that purpose, then the plaintiff was not entitled to recover; to which the plaintiff excepted. The jury found for the defendant and against the plaintiff.

The third section of the act of 1797, which is section 951 of the Revised Statutes, and the true construction of which is involved, reads as follows:

“In suits brought by the United States against individuals, no claim for a credit shall be admitted upon trial except such as appears to have been presented to the accounting officers of the Treasury for their examination, and to have been by them disallowed in whole or part, unless,” &c.

The other material facts appear in the opinion.

H. H. Wells, U. S. District Attorney, for plaintiff.

It will be observed that the restriction of the statute [see statement] applies to *all* suits brought by the United States and to *all* individuals; it is not confined, as other sections of the act are, to suits against persons sustaining an official relation to the United States, but is a plain and unambiguous reservation to the United States of an important right to have all claims excluded from judicial inquiry which have not first been submitted for examination, allowance, or rejection to the accounting officers of the Treasury. (*United States v. Giles et al.*, 9 Cranch, 236; *Same v. Wilkins*, 6 Wheat., 148; *Same v. Ripley*, 7 Pet., 25; *Same v. Fillebrown*, 7 Pet., 28; *Same v. McDaniel*, 1 Pet., 1; *Same v. Robinson*, 9 Pet., 367;

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10 Pet., 625; 12 Pet., 1; 7 Wall., 491; 18 Wall., 63; 1 Otto, 559.)

All the cases upon this subject rely largely upon the settled doctrine that the United States cannot be sued except under such conditions and limitations as the government may itself prescribe. It is entirely competent for the United States to repudiate all the debts alleged to have been contracted by Lamon in its behalf, and it does, by the statute which we are now considering, refuse to recognize or to allow to be offered in set-off any claim of any kind which has not first been presented to such accounting officers. Such presentation is the condition precedent upon the performance of which the claim could only be offered and considered.

It is very probable that the defendant has a meritorious claim, but he has no right, nor is there any consideration of equity that ought to allow him to override the statutory *requirement*. There is in fact no limit to the depredations upon the Treasury of the United States which would be possible if claimants can submit their demands, well or ill founded, to the judgment of jurors without first subjecting them to examination by the proper accounting officers. And whatever this defendant may do in this particular, all others may do under the same circumstances.

Another ground upon which the reversal of the judgment in this case is asked, is that the claim was barred by the statute of limitations of March 3, 1873, and never could be proved or allowed after the 30th of June, 1874, by the accounting officers of the Treasury, nor before any court or jury.

Section 3489 of the Revised Statutes, p. 696, provides that no claim against the United States "for collecting, drilling, or organizing volunteers for the war of the rebellion shall be audited or paid unless presented before the 30th day of June, 1874."

This claim was of that character, and falls within the language and spirit of the act, and it was not presented before the day mentioned.

No detailed statement or itemized account of the expend-

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itures was ever presented or rendered. The names of persons who furnished the goods are not found in the claim. Nor is there any specification of kind, amount, price, or character of the articles supplied. All we have is the "amount of money expended in June, July, August, September, October, November, and December, 1861, in raising, clothing, subsisting, and equipping."

Nathaniel Wilson, for defendant.

The action being to recover \$2,000 money had and received to the use of the plaintiffs, the defendant's testimony that he had paid out all that he had received for the purpose for which he had received it, did not constitute a "claim for a credit," within the meaning of the statute, but related wholly to the plaintiff's right of action.

"In commercial law, credit is understood as opposed to debit; credit is what is due to a merchant, debit is what is due by him."

A "claim for credit" is a claim "for what is alleged to be due."

"The object of the act," says the Supreme Court of the United States, in the case of *The United States v. Wilkins*, 6 Wall., 135, "seems to be to liquidate and adjust all accounts between the parties, and to require a judgment for such sum only as the defendant in equity and justice should be proved to owe to the United States."

The defendant was not a disbursing officer. He did not receive any money from the United States. He is not charged with any money on the books of the Treasury.

The defendant on his part had no account against the United States for the \$2,000 which he had paid out after receiving it from the disbursing officer. He never made any claim for that amount, nor to be credited that amount. His only "claim" was that he had paid out the money he received for the purpose for which he received it. If his testimony be true, and it is not impeached, upon what grounds can the United States recover \$2,000 from the defendant? It is said

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that the defendant, having failed to comply with the requirements of the law hereinbefore quoted, the government is entitled to a judgment, on proof that money of the government came into the hands of the defendant.

Suppose that the money in question had been paid directly by the disbursing officers to the butchers to whom it was due, instead of being paid to the butchers through the defendant: would the government be entitled to a judgment against the butchers unless they could show that they had made a claim for a credit to the accounting officers of the Treasury, and that the claim had by them been disallowed? To affirm such a pretension on the part of the government is to say that every person who receives the money of the United States, whether in payment for goods sold or for services rendered, is liable to be sued for what he receives, and can make no defense except after invoking the action of the accounting officers of the government upon matters which, as it seems to me, are wholly outside the limits of their duty as prescribed by law.

The liability of the defendant is not in any respect different or more extensive than that which attaches to every person who receives the moneys of the government from a disbursing officer. He was, it is true, an officer of the United States, and he had nothing to do with the expenditure of public moneys. Colonel Devin, by whom the check was signed, was a disbursing officer, and liable to the United States for all public moneys received by him. He was required by law to give bond for the faithful performance of his duties. For the money which is claimed of the defendant he is responsible. The payment of the money by Colonel Devin to the defendant was a transaction between individuals. If the disbursing officer failed to take vouchers for his payments which would entitle him to a credit for the amount paid on the settlement of his account, it may be that in such settlement he has actually been allowed credit for the amount claimed.

The record shows that the defendant, having been informed that his meritorious defense could not otherwise be consid-

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ered by the court on the trial of this suit against him, presented to the accounting officers the statement of his account.

Although no claim was made for a credit within the meaning of the statute, it was supposed by the defendant that he was complying with a technical requirement of the law.

It was objected that the act of the defendant was not in compliance with the law, because (1) no vouchers accompanied the account, and (2) the claim was barred by the statute referred to in the auditor's endorsement.

So far as this suit is concerned and the amount sought to be recovered, these objections do not debar the defendant from availing himself of the defense which he sets up. (*United States v. Laub*, 12 P., 1.)

Mr. Justice WYLIE delivered the opinion of the court :

This was an action of assumpsit in the common counts to recover \$2,000 with interest. At the trial plaintiff gave in evidence two drafts, as follows:

No. 75. WILLIAMSPORT, MD., December 23, 1861.

ASSISTANT TREASURER OF THE U. S., New York.

Pay to Colonel W. H. Lamon, or order, one thousand dollars (\$1,000).

J. D. DEVIN,

Lt. 9th Inf'y, A. A. Q. M.

(Paid February 22, 1862.)

No. 76. WILLIAMSPORT, MD., December 23, 1861.

ASSISTANT TREASURER OF THE U. S., New York.

Pay to Colonel W. H. Lamon, or order, one thousand dollars (\$1,000).

J. D. DEVIN,

Lt. 9th Inf'y, A. A. Q. M.

(Paid February 22, 1862.)

Plaintiff there rested. This was plaintiff's whole evidence.

The evidence showed that Lamon had been paid \$2,000 on account of the United States, and this was all it showed. It did not show that the United States had any right to recover the money. In an action for money had and received to the plaintiff's use, the plaintiff cannot recover the money unless he proves that it is against conscience for the defendant to

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keep it. (1 Selwyn's N. P., 99.) The burden of showing this is upon the plaintiff. In the absence of proof upon that point, the presumption is that the money was lawfully paid to the defendant, and that he has the right to retain it.

In the present instance the plaintiff's own evidence was not sufficient to entitle it to a verdict against the defendant. Defendant was not content, however, to occupy this secure position, but chose to set up the defense that not only had all this money been expended in the service of the government, but a very large sum of his own in addition, which had never been repaid, but which, after so great a lapse of time, he did not seek to have repaid. Believing, however, that he would be denied the right to make any defense against the government unless such defense were first made out and presented for settlement at the Treasury, as is required by law in cases of set-off, he made out and presented to that department a claim amounting to \$23,000, less the amount of the two drafts in question. His claim was sustained by no evidence except his own affidavit, all his vouchers having been lost or destroyed, as he stated, in the course of military operations during the war in the valley of Virginia. Of course the claim was rejected by the accounting officers of the Treasury, the auditor saying: "If the said claim was supported by full and complete vouchers, still it would be debarred by section 3489 of the Revised Statutes of the United States, p. 695."

Undoubtedly the action of the accounting officers was correct. Without vouchers for any item of the claim, except the claimant's own affidavit, it could not lawfully be allowed.

At the trial below, however, defendant again offered the same papers in evidence. The plaintiff objected; the objection was overruled, the papers admitted in evidence, and a bill of exceptions taken by the plaintiff.

It appears to us that these papers were equally inadmissible for evidence in the court as at the Treasury.

The subsequent testimony given by the defendant was competent for the purpose of showing the circumstances and the consideration attending the giving of the drafts in question,

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but for no purpose beyond that. Indeed, the defendant himself disclaimed an idea of asking for a verdict from the jury for the balance in his favor, as set up in the claim presented to the Treasury Department. The testimony, if believed, was conclusive on this point, and showed that Lamson's conduct had been not only perfectly honest, but highly patriotic in the transaction; and we have no doubt whatever as to the perfect verity of his statement in regard to that matter. His whole defense, however, was unnecessary, for the plaintiff had made out no case against him; and so he is entitled to have an affirmance of this judgment, notwithstanding the error in admitting in evidence the papers which had been presented to the Treasury Department.

FRANCES H. BARTON v. JOHN S. BARBOUR, RECEIVER.

AT LAW.—No. 17,278.

The defendant was appointed by a decree of the Circuit Court of Alexandria, Virginia, receiver of a railroad in that State. The plaintiff was injured while a passenger on such road, and brings this action against the receiver for damages; and it was held that the action would not be maintained in this jurisdiction without leave of the court which appointed defendant such receiver.

STATEMENT OF THE CASE.

This is an action at law against the defendant as receiver of the Washington City, Midland and Great Southern Railroad, a corporation organized under a law of the State of Virginia, and doing business and having an office in the District of Columbia. The declaration states that the defendant, on the 11th of January, 1877, was running and operating a railroad through the State of Virginia as a common carrier of freight and passengers for hire, and that the plaintiff was a passenger upon said railroad, and by reason of a defective and insufficient rail upon the track, the car in which the

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plaintiff was a passenger was thrown from the track, and she was thereby greatly hurt and injured, and her bodily health permanently impaired. The plaintiff claims damages in the sum of \$5,000.

The special plea of the defendant reads as follows:

"And now comes the defendant in his own proper person and says that the court ought not to take further cognizance of said action, because, he says, at the time of suing out and service on him of the said writ he was the receiver of all the real and personal property, rights, privileges, and franchises of the said Washington City, Virginia Midland and Great Southern Railroad Company, under an order issued by the Circuit Court for the city of Alexandria, in the State of Virginia, in vacation, on the 13th day of July, 1876, in a cause therein depending, on the equity side of said court, of the style of "John C. Graham, who sues for himself and others, v. The Washington City, Virginia Midland and Great Southern Railroad Co. *et al.*" That by said order or decree he was authorized to defend all actions that might be brought against him as such receiver by permission of the said court, and that he should not in any case incur any personal and individual liability in the operation of said line of railroad, or otherwise in the premises, by reason of any act or thing done by him, or his servants, agents, or attorneys, the said receiver acting in good faith and in the exercise of his best discretion; but the property in his hands as such receiver should nevertheless be chargeable with any claim that may be established against such receiver in any action brought against him by any person under leave of the court first had and obtained.

"That the plaintiff hath not had and obtained leave of the said Circuit Court for the city of Alexandria to bring and maintain this his action aforesaid; and this the defendant is ready to verify. Wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid."

To this plea the plaintiff interposed a general demurrer,

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and the case was certified to the general term to be heard in the first instance.

S. S. Henkle, for plaintiff.

The defendant is sued as receiver of the Washington City, Virginia Midland and Great Southern Railroad, a Virginia corporation, having an office and doing business in this District. He was appointed by a decree of the Circuit Court of Alexandria, and the only question made by the plea and demurrer is, whether he may be sued in this jurisdiction without leave of the court which appointed him having first been obtained.

It is broadly laid down in High on Receivers, section 254, that it is in all cases necessary that a person desiring to bring suit against a receiver should first obtain leave of the court appointing him; and numerous authorities, both English and American, are cited.

They are all cases in which either application for leave to sue is made, or application for injunction to restrain such suits commenced without leave.

Sometimes the leave to sue has been granted, and sometimes withheld; and in most cases referred to, if not all, when application was made to restrain suit commenced without leave, the injunction has been allowed. They are, I believe, all cases affecting the property in the possession of the receiver, as in *Tink v. Randle*, 10 Beav., 318; in the matter of *Persse et al.*, 8 Ire. Eq., 111; *Parr v. Bell*, 9 Ire. Eq., 55. In the same section of High, 254, it is said that when an action is instituted against a receiver without leave, the plaintiff is in contempt of court and will be punished.

The cases referred to by High are *De Groot v. Jay et al.*, 30 Barb., 483, and the same case reported in 9 Abbott's Practice, 364. The syllabus in Abbott is, "A receiver who is sued as such without leave is entitled to an order perpetually restraining the plaintiff from proceeding in the action." And the case of *Taylor v. Baldwin*, 14 Ab. Pr., 166: here the plaintiff applied to the court for leave to bring suit against the receiver

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to recover jewelry in his possession as receiver, which was refused, and he thereupon brought the suit. He was fined for contempt and his action stayed. The proceedings were all in the same court.

It is not in either of these cases intimated that the want of leave goes to the jurisdiction of the court, but that the plaintiff may be punished for contempt, and have his action stayed by injunction or order.

I think no English case can be found where it was held or claimed that the want of leave to bring suit against a receiver affected the jurisdiction of the court.

There is a class of American cases in which it has been held that where one court has obtained possession of property, and is proceeding to administer it, another court has no jurisdiction to interfere with such possession. (See *Mil. and St. P. R. R. v. Mil. and Minn. R. R. et al.*, 20 Wis., 165.)

This is as far as any American case has ever gone. No case can be found where it has been held to be an objection to the *jurisdiction* of the court that leave has not been obtained when the action or proceeding does not directly interfere with the *possession of the property* in the custody of the receiver.

In *Hill v. Parker*, 111 Mass., 508, it is said that where an action is brought against a receiver without leave of the court, the possession of the receiver is not necessarily a defense at law, and the court of chancery, if applied to for an injunction, may in its discretion allow the action to proceed to judgment, and to be defended by the receiver, and several English and American cases are cited as authority. In 6 Vesey, 286, ejectment had been brought, without leave, for property in possession of the receiver. The lord chancellor gave the receiver leave to defend.

In *Asten v. Herm*, Myln & Keene, 390, the receiver made a distress for rent. The tenant brought his action of trespass against the receiver and the bailiff. The receiver applied for an injunction, which was granted by the lord chancellor. (High on Rec'rs, sec. 256, p. 169.)

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Receivers are under the protection of the court appointing them; but this protection is only granted or refused on their own application by the court appointing them, in its discretion, depending upon the circumstances of each case. (*McKinnan v. Palmer*, 7 Ire. Eq., 496; *Kinney v. Crocker*, *Rec'r*, 18 Wis., 74; *Camp v. Burney*, 11 N. Y. Sup. Ct., 373; *Blumenthal v. Brienkerd et al.*, 38 Vt., 402; *Page v. Smith*, 99 Mass., 395; *Allen v. The Central R. R. of Iowa*, 42 Iowa, 638; High on *Rec'rs*, sec. 398, pp. 283, 284.)

The receiver is here sued in his official capacity for a tort committed by him or his servants while operating the road. Although, upon the principle of some of the adjudged cases, the defendant might be personally liable, yet I think the weight of authority is, that he is only liable in his official character for the torts of his agents or servants. (High on *Rec'rs*, sec. 255, pp. 168, 169; *Meara's Adm'r v. Holbrook*, 20 Ohio St., 137.)

The defendant was running and operating the road with substantially the same power possessed by the company before his appointment, and is in law, so far as the public is concerned, a common carrier, and in his official capacity is liable as such to the same extent that the company would have been, and may be sued for torts without leave of the court appointing him. (High on *Rec'rs*, sec. 398, pp. 263, 264; *Camp v. Burney*, 11 Sup. Ct. of N. Y., 373; *Sprague v. Smith*, 29 Vt., 421; *Blumenthal v. Breinkerd et al.*, 99 Mass., 395; *Allen v. The Central R. R. of Iowa*, 42 Iowa, 633.)

Walter S. Cox and Linden Kent, for defendant.

Receivers are under the control of, and are amenable only to, the court for their appointment.

The possession of the receiver is the possession of the court, and any attempt to disturb it without leave of the court first obtained, will be a contempt on the part of the person making it. (*Angel v. Smith*, 9 Vesey, 335; 6 Vesey, 287; 1 J. & Walker, 178; *Wiswall v. Sampson*, 14 How., 52.)

Where the property is legally and properly in the posses-

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sion of the receiver, it is the duty of the court to protect the receiver in the possession thereof, and any proceeding or suit instituted against the receiver without the leave of the court, is considered to be in contempt of the court, and an action so brought will be stayed. (*Parker v. Browning*, 8 Paige, 388; *Albany City Bank v. Shermerhon*, 9 Paige, 372; *Taylor v. Baldwin*, 14 Abb. Pr., (N. Y.), 166; *De Groot v. Jay*, 30 Barb., 483; *O. & M. R. R. Co. v. Davis*, 23 Ind., 553; *Noe v. Gibson*, 7 Paige, 513; *O. & M. R. R. Co. v. Fitch*, 20 Ind., 498; *Tink v. Rundell*, 10 Beav., 318; *Edwards on Rec'rs*, p. 145; *Meura's Adm'r v. Holbrook, &c.*, 20 Ohio St., 137; *Henderson v. Walker, Rec'r*, 55 Ga., 481; *Vermont and Canada R. R. Co. v. Vermont Central R. R.*, 46 Vt., 798.)

The remedy to a party having a demand against a receiver is by petition to the court of equity to be permitted to bring an action against the receiver, or to be examined before the master *pro interesse suo*. (3 Dan. Ch. Pr., 1984; 2 Mad., 21; 1 P. Wms., 308; *Wiswall v. Sampson*, 14 How., 65.)

The general doctrine already considered, that receivers are answerable only to courts appointing them, is to be accepted with certain qualifications. Says High on Receivers, section 279, citing *Paige v. Smith*, 99 Mass., 395: "That where receivers are operating a railroad under appointment of a court of chancery in one State, and the courts of that State hold them liable as common carriers, and they are acting in that capacity, they are liable to an action in the courts of another State for a breach of duty as common carriers."

The above qualification is opposed to the current of authorities; but if it be law, it is not applicable to the present case.

This court has no greater jurisdiction over the receiver than courts of general jurisdiction in Virginia would have.

Under the authorities relied on, its jurisdiction is only made co-extensive with that of the courts of Virginia.

The liabilities as well as the rights of this receiver arise under the terms of the order of his appointment.

The said order, in limiting the manner in which he shall

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be chargeable, contains this provision: "But the property in his hands as such receiver shall nevertheless be chargeable with any claim which may be established against said receiver in any action brought against him by any person under leave of this court first had and obtained."

The same powers and liabilities with which the receiver in this case is clothed, under and by virtue of the order of his appointment, are extended to all receivers in the State of Ohio under a general law which provides that a receiver may sue and be sued as receiver, under control of the court: *Held*, That leave of the court must be obtained to bring suit against the receiver. (*Meara's Adm'r v. Rosevelt and Holbrook*, 20 Ohio St., 137; *Hubbell, &c., v. Receiver Utica Ins. Co.*, 9 How. Pr., 424.)

Where the action is against the receiver of a corporation, judgment will be entered, payable out of the corporate funds in his hands. (*Commonwealth v. Runk*, 26 Penn., 235.)

The question of the right to sue a receiver in a court other than that in which he is appointed, is one of jurisdiction. (*Louisville R. R. Co. v. Canble*, 6 Am. R. R. Rep., 349; *Potter, Receiver, v. Bunnell*, 20 Ohio St., 152.)

Mr. Justice MACARTHUR delivered the opinion of the court:

The plea demurred to would probably not be sustained in the State of Vermont, because the courts of that State appear to have decided that a receiver, operating a railroad as a common carrier, would be liable in an action for damages occasioned by any breach of his obligation while acting in that capacity. In *Paige v. Smith*, 99 Mass., 395, this doctrine is imputed to the courts of that State, and it is held that a receiver appointed there would be equally liable to an action in the courts of another State for a similar cause of action, instituted without the permission of the court appointing the receiver. In *Kinney v. Crocker*, 18 Wis., 74, and *Allen v. The Central R. R. of Iowa*, the same rule is asserted. With the exception of these authorities, it is not too much to say that the decisions in England and in the United States are to

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the effect that it is requisite to apply to the court of chancery in which the receiver was appointed, when a suit is to be brought against him in his official capacity. This rule is established by so many authorities that citation is scarcely necessary. The briefs of counsel are sufficiently full of such references. The possession of the receiver is considered that of the court, and it is therefore regarded as the duty of the court to protect the possession of its officer from any invasion of persons or suits at law. Any party may come into court and test the justice of any claim he has upon the fund, and he may be himself examined *pro interesse suo*. If he has a prior interest it will be protected, and he will be permitted to bring such suits at law as may be proper to determine any legal or equitable rights he may have upon the estate. The court of chancery having acquired jurisdiction of the subject-matter, will retain it for the benefit of those who may be found ultimately entitled to it. (2 Story Eq. Jur., secs. 331-334; *Parker v. Browning*, 8 Paige, 388.)

It was earnestly urged by counsel for plaintiff that this was a mere claim for damages, and that it did not affect the possession of the property in the receiver. The same view was relied upon in *Wiswall v. Sampson*, 14 How., 52. The Supreme Court disposed of that view of the case by observing: "But conceding the proceeding [at law] did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made; and in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation." So that wherever a claim is made which will affect the estate, the court will pay no respect to it when acquired during the suit, unless presented for audit and adjudication. The court will administer the

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property and protect and preserve every interest. This is the rule as settled by the Supreme Court, and we must follow it as binding authority. The Supreme Courts of the States may entertain different views, and feel that they are not bound by the decisions of that tribunal. Not so with us. And until a different rule shall prevail, we must adhere to that so clearly established.

There must be judgment for the defendant upon the demurrer.

PHENIX MUTUAL LIFE INSURANCE COMPANY v. ALBERT GRANT ET AL.

EQUITY.—No. 4291.

- I. When a motion is certified to the general term to be heard in the first instance, the same order will be made as, upon the whole case, ought to have been made by the justice holding the special term.
- II. When a mortgage or deed of trust does not in express terms create a lien upon the rents and profits of the mortgaged property, a receiver thereof ought not to be appointed for the benefit of those interested, simply upon an averment in the bill that the mortgaged estate is an inadequate security, and that the grantor is insolvent. [OLIN, J., HUMPHREYS, J.]
- III. When a receiver is appointed before the coming in of the answer, the defendant will be allowed to move to discharge the receiver after the answer is interposed. And if the bill and answer taken together show that a receiver ought not to have been appointed, the receiver will be discharged.
- IV. The defendant consented to the appointment of a receiver upon certain terms, but such terms were not observed in making the appointment, and afterwards the answer came in; upon which and upon affidavit, a motion was made to discharge the receiver and to restore the property to the possession of the defendant; and it appearing that the receivership was inexpedient and unfit to be longer continued, the court allowed the motion, although no blame was attached to the receiver.

STATEMENT OF THE CASE.

This was a motion to discharge a receiver who had been appointed before the defendant answered the bill.

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The allegations in the bill tending to lay a foundation for a receiver are the following:

“That the amount due the plaintiff, secured as aforesaid on said property, largely exceeds its value, and is more than it will sell for under the most advantageous circumstances.

“That the said Grant is insolvent, and said property is very much deteriorating for the want of necessary repairs, which said Grant is unable and unwilling to make.”

A receiver was appointed May 7, 1875, to rent several of the houses, and he has been in possession of the premises since that time. The defendant Grant, in his answer to the application for a receiver, consented that the appointment might be made, and a direction given to the receiver to complete the houses which were then in an unfinished condition, and to employ him in the work; and soon afterwards he filed in the cause a proposal to complete the buildings at the estimated prices on which the receiver had based a report on that subject. The receiver was appointed to receive the rents and profits without regard to the terms proposed by the defendant Grant. November 27, 1875, Grant filed his answer, denying a great part of the indebtedness and pleading a want of jurisdiction, a non-joinder of numerous parties, usury, and that the alleged indebtedness was paid and satisfied before the bringing of this suit. At the same time he filed a cross-bill for affirmative relief. Other proceedings followed which are unnecessary to state in this connection, and finally the motion to dissolve the receivership was made, and has been certified here to be heard in the first instance. The briefs of counsel are too lengthy for insertion in this report, and they are so compact as to preclude an abstract of their contents.

R. T. Merrick and William F. Mattingly, for complainant.

B. F. Butler, Durant & Hornor, O. D. Barrett, and William A. Meloy, for defendant Grant.

Mr. Justice OLIN delivered the opinion of the court:

It is unnecessary to enter into any lengthy detail of facts

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in reference to this prolonged and extraordinary controversy. If it shall be continued in the future as long as it has been in the past, it is quite obvious that the result will be that out of a property of the value of nearly half a million of dollars, neither the plaintiff nor defendant will derive any benefit.

The question before us arises on a motion to discharge the receiver appointed in this case in May, 1875.

That motion would ordinarily be heard before the judge holding the special term, or in his discretion might be certified to and heard at the general term in the first instance, which was done in this case; and this court is now to make the same order as, we think, on the whole, ought to be made by the justice holding the special term.

The order appointing a receiver, which was prayed for in the bill of complaint, seems to have been made principally in pursuance of the answer of the defendant Grant to the rule to show cause why a receiver should not be appointed. In that answer the defendant Grant says, in view of these facts, the defendant desires that ten of the houses, (giving their numbers,) be completed under authority of this court, and be rented for a period not exceeding three years, and that the rents be paid into the court; and the defendant prays that R. J. Meigs, clerk of the Supreme Court of the District, or some disinterested person, be appointed a receiver, and be directed to have the unfinished buildings numbered from 1 to 14, with the exception of number 13, completed under the superintendence of the defendant Grant, and apply the rents, as far as may be necessary, to the payment of the expense for completing these buildings, and if necessary, to make a temporary loan for the purposes aforesaid, the same to be reimbursed from the rents of said buildings; that all the rents not expended in the completion of said buildings may be paid into court, to abide the order and judgment of the court. Upon Grant's answer to the rule to show cause, an order was made by the court at special term appointing Phillips and Wilson receivers, wholly ignoring the conditions upon which Grant assented to the appointment of a receiver. This pro-

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ceeding for the appointment of a receiver was had before Grant filed his answer to the bill of complaint. Upon filing his answer, a motion is made to the court to discharge the receivers, and that is this question now before us.

When a receiver is appointed before the coming in of the answer of the defendant after answer is interposed, the defendant is allowed to move to discharge the receiver; and if the bill and answer, taken together, show that a receiver ought not to have been appointed, the receiver should be discharged.

It will be observed that the mortgage or deed of trust, as it is called, did not mortgage or create any lien upon the rents and profits of this property; and while it is averred in the bill that the property mortgaged is an inadequate security for the amount of money loaned to the mortgagor, and that he is insolvent, that affords no grounds whatever for seizing upon the rents and profits before foreclosure or sale of the mortgaged premises. Indeed, the grocer or merchant who supplied the necessities of life for Grant and family has a much higher equity on the rents and profits than the mortgagee. The latter loaned Grant money and took security for the repayment of it, but the former sold him goods on his personal credit.

What justice or equity is there in allowing a mortgagee to claim any rights in reference to something not mortgaged to him, over and above the rights of any other contract creditor?

No well adjudicated case can be found, I think, that allows the appointment of a receiver of rents and profits, when these rents and profits were not mortgaged, except, perhaps, in the State of New York, in which these decisions depend mainly upon the statute laws of that State; and these decisions may be laid out of the question so far as this case is concerned.

The question is so much better stated in the brief of the defendant's counsel, that I take the liberty to quote from it. In reference to a mortgaged security he says:

“What security does a man take? He takes such as he agrees to take. Has the court any right to give him any

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more than he agreed to take? I mortgage my house, and my creditor chooses to take that mortgage: am I to give him any more than I agreed to give him? He has a right, under the law, to take possession, and then he gets all; but until he does, it is mine.

"I mortgage the rent of my house without the house: would he take anything more? He has just the security he agreed to take. If it was more or less, it was the contract between the parties, and the court has no right to make a new contract for the parties, and never does make a contract for them."

And the counsel might further have added, that among parties competent to contract, in the absence of any allegations of fraud, imposition, or mistake, a court of equity has no more power to set aside, modify, or alter the contract of the parties than has a court of law. To this extent has the length of the chancellor's foot been shortened in these modern times. But waiving the question as to the power of the court of equity to appoint a receiver to take the rents and profits of mortgaged premises, when such rents and profits are not mortgaged, and supposing such power was vested in a court of equity, that power, exercised in this case, has proved a signal failure.

Property to the value of half a million dollars, nearly, has been in the hands of a receiver appointed by this court for nearly four years, and is evidently going to destruction, and without yielding a revenue sufficient to pay the ordinary taxes. For this condition of things this court is mainly responsible. I impute no fault to Mr. Wilson, the receiver. He has done as well, probably, as would any other man under like circumstances.

The consequences which have ensued are but the inevitable results of such a proceeding. The worst mode of administering law or equity is by granting injunctions or appointing receivers. The thing enjoined generally dies of inanition before the close of the litigation, and the thing to be received

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seldom pays the amount of expense incurred in receiving it. We think the receiver in this case should be discharged.

The question of the gravest importance in this case has been argued at great length, and that is, whether upon the dismissal of the creditor's bill filed by Carter, in which the plaintiff in this suit was made defendant, and appeared, is conclusive as to his further litigation of the claim set up in the present bill.

Upon that question we express no opinion, not deeming it necessary to the proper solution of the question now before the court.

HUMPHREYS, J., concurred.

MACARTHUR, J.—I will simply say that, in concurring in the judgment of the court, I restrict my view of the case simply to the fact that a receivership is entirely within the discretion of the court, and that when it fails to accomplish the purpose of a genuine receivership, the court should no longer continue it. It is quite impossible for me to regard the history of this receivership, other than establishing the fact as expressed in the written opinion, that it has signally failed in its main purpose, and it is for that reason that I concur in the discharge of the receivership, and without any imputation upon anybody who has acted in that capacity.

In regard to whether a trust deed or mortgage upon real property covers the rents and profits in case the security should prove inadequate, that is a question upon which I desire to hold myself open.

WYLIE, J.—I have been requested by the chief justice to say that he dissents in this decision, and for myself I concur in his dissent.

We all agree that the receiver has performed faithfully his duty in this case.

It is a matter entirely for the discretion of the court. It may discharge or appoint a receiver. A majority of the court in this case seem to think that experience has shown that this

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property has not yielded much for the benefit of the creditor, and the remedy is to take it out of the hands of the receiver, who has been doing something in that way, and put it in the hands of the debtor, from whom nothing would be received for the creditor.

There is one circumstance, I may say, that would seem—I do not know whether sufficient to authorize the discharge of this receiver—but, at any rate, to reconcile me to the decree or order, and that is, the unaccountable delays of the creditor in bringing the cause to final hearing. Here is a cause standing upon a plea which may be set down for hearing at any time, and there seems to have been unnecessary delay in this respect. Undoubtedly there are good reasons for it, but they are not apparent to me.

THE UNITED STATES, ON THE RELATION OF THOMAS P. MACMANUS, v. WILLIAM B. MOORE, JOHN A. THOMPSON, BENJAMIN B. GROOM, HARRISON P. THOMPSON, BENJAMIN B. BRISTOW, AND HUGH ANDERSON AND J. C. KENNEDY, ADMINISTRATORS OF THE ESTATE OF THOMAS J. D. FULLER.

AT LAW.—No. 16,122.

- I. Where a claim against the United States was referred by the Secretary of War to the Court of Claims, a judgment rendered thereon upon the merits in favor of the claimants, from which no appeal has been taken, and without a motion for a new trial having been made, is final and conclusive as to all questions which were or which might have been properly considered or decided by the court.
- II. The relator in a *qui-tam* action founded upon sections 3490 and 3491. Revised Statutes, is equally concluded by a judgment in the Court of Claims against the United States.
- III. An attorney and counsellor at law who is retained to argue a cause pending in the Court of Claims, is not liable to the action contemplated by the sections of the Revised Statutes above referred to.
- IV. The Court of Claims is not an officer, "civil or military," within the meaning of section 5438 of the Revised Statutes.

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The facts sufficiently appear in the opinions.

H. H. Willard, Matt. H. Carpenter, H. S. Foote, and S. E. Jenner, for the relator.

P. Phillips and J. Hubley Ashton, for defendants.

Mr. Justice HUMPHREYS delivered the opinion of the court:

The relator, Thomas P. MacManus, brings a suit in the name of the United States against William B. Moore, Bristow, and others, for the recovery of an amount of money which, he says, the defendants by combination and conspiracy obtained from the United States Treasury on and upon a false and fraudulent claim.

The concluding paragraph of the declaration is in these words: "Wherefore, in consideration of the facts herein set forth, and under the authority of the act of Congress above set forth, the said Thomas P. MacManus, in the name of the United States, doth now ask judgment against the said defendants for the damages and penalty provided by law, and *especially for his half* of the said penalty and damages, together with his proper costs of suit."

It is true that what we call *qui-tam* actions are provided for in England and in most of the States of this Union, and in this case by act of Congress.

But we are relieved from any further inquiry into the merits of this whole matter by the fact that the Court of Claims has given a *judgment* for the amount which was found due. That court is as competent to take care of frauds or attempted frauds upon its jurisdiction as is the highest court in the British Empire, or any court in the United States.

It passed the claim, and it is the only tribunal known to our laws as a judicial one which can properly render a judgment against the United States that the government is in duty bound to respond to by way of appropriation.

The government of any country *cannot* be sued except through a tribunal established by itself. The statute has expressly created this Court of Claims to adjudicate the matter

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of dues to its own citizens, and has given it full power to inquire into alleged impositions, frauds, speculations, or other wrongs involving a proper judgment, and no other court can collaterally inquire into its proceedings. Such a course would be to mix up jurisdictions and make confusion worse confounded, which the true spirit of the law abhors.

We can say no more than we have already uttered, that the court which heard and passed the claim is every way competent to take care of everything involved in this suit. The full declaration exhibits a charge of combination and conspiracy to cheat and defraud the government.

Yet the facts and law are, that the questions now attempted to be inquired into were altogether proper for the tribunal which allowed the claim.

Until that court has had a proper case laid before it in the recognized mode and manner, we cannot interfere. To do so would be absolute assumption, resulting in conflict of jurisdiction.

The judgment is affirmed.

Mr. Justice MACARTHUR delivered an oral opinion, in substance as follows:

I concur in the decision just read, but I desire to add some views of my own arising more particularly out of the state of the pleading.

The action is founded on sections 3490 and 3491, Revised Statutes, which provide for a civil action against all persons making false claims against the United States, and declaring that they shall forfeit and pay to the United States the sum of two thousand dollars, and in addition double the amount of damage which the latter may have sustained.

It is further provided that the suit may be brought and carried on by any person as well for himself as for the United States, but at his sole cost and charge, and section 3493 gives to the person bringing such suit one-half the amount of the forfeiture and damages which may be recovered and collected. The acts for which this action lies are prohibited by section

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5438, against presenting false claims for payment or approval to or by any person or officers in the civil, military, or naval service of the United States, and against any combination or conspiracy to defraud the government by obtaining the payment or allowance of any such claim.

The declaration sets forth that the defendants entered into a fraudulent agreement for the purpose of cheating and defrauding the government, and that they did conspire and combine, and did aid and assist in obtaining payment of a fraudulent and fictitious claim for the sum of \$108,750, well knowing that the claim was false, fictitious, and fraudulent; that such claim purported to be founded upon a contract for mules, which is set forth, as follows:

“OFFICE ASSISTANT QUARTERMASTER,

“NASHVILLE, TENN., *March 9, 1865.*

“I hereby obligate myself, as an officer of the government, to receive of T. T. Taylor, agent, one thousand (1,000) good serviceable mules, that will inspect up to the required standard; said mules to be delivered in Nashville, Tenn., on or before the 20th day of April next, at the following prices, to wit: One hundred and sixty dollars (\$160), one hundred and sixty-seven dollars and fifty cents (\$167.50), one hundred and seventy-five dollars (\$175) each, respectively, for fourteen (14), fourteen and one-half (14½), and fifteen (15) hand mules.

“HENRY HOWLAND,

“*Captain and A. Q. M.*”

It is then averred that the contract was accepted by the defendants through T. T. Taylor, their agent, and that they falsely and fraudulently alleged that in consequence of the failure of the United States to comply with the terms of said contract great damage had been done them, to the amount before mentioned, whereas no such injury had been in point of fact incurred.

Two pleas were interposed by the defendant Bristow: first, the general issue, and secondly, a special plea denying the combination and conspiracy, and denying generally, specially, and specifically each and every allegation of fraud in the

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declaration, and averring that the claim was a just, *bona-fide*, and valid claim against the United States.

It is also alleged that the claim set out in the plaintiff's declaration was presented to the Secretary of War for payment, and was, on the recommendation of the Judge Advocate-General, referred to be adjudicated in the Court of Claims, and that such proceedings were had therein that on the 5th day of January, 1874, final judgment was rendered on said claim against the United States in favor of the claimants for the sum of \$108,750, which was afterwards paid by the United States out of its treasury. The conclusions of law and the judgment of that court are set out at large in the said second plea. After stating that evidence was duly taken in said Court of Claims on behalf of the claimants, under the direction of their attorney, in support and proof of said claim, according to the practice of that court, for the purpose of proving the contract and the breach thereof by the United States, and the amount of the damages sustained by the claimant in consequence of such breach, the defendant Bristow avers as follows:

"After all the evidence in support and proof of the said claim had been taken and filed as aforesaid in the said court, and after the said case was prepared and ready for argument, he, the said defendant, being an attorney and counsellor at law, was duly employed and retained by the said claimants to argue the said case as their counsel on their behalf before the said court, when the same should come on for argument, in association with their said attorney of record, T. J. D. Fuller, Esq.; and the said case coming on for argument in the said court, he, the said defendant, did, on or about the 28th day of October, 1873, in his character and capacity aforesaid, as counsel of the said claimants, in pursuance of the employment and retainer aforesaid, argue the said case before the said court for and on behalf of the claimants, upon the facts disclosed by the record in the said case and the law understood by him to be applicable to those facts.

"On the same day, or on a day subsequent, in the same

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term, the said case was also fully argued on behalf of the United States by the Assistant Attorney-General of the United States, in charge of the business of the United States in said court, and duly submitted to the court; and afterwards, to wit, on or about the 5th day of January, 1874, the opinion of the said court in favor of the said claimants was delivered by the Hon. Charles C. Nott, one of the judges of the said court, and thereupon the said court ordered a judgment to be entered in the said case against the United States in the words and figures following, to wit:

“ ‘The court, on due consideration of the premises, find for the claimants, and order, adjudge, and decree that the said Harrison P. Thompson, William B. Moore, John A. Thompson, and Benjamin P. Groom, composing the firm of John A. Thompson & Co., do have and recover of and from the United States the sum of one hundred and eight thousand seven hundred and fifty dollars (\$108,750).’

“The said court did thereupon, according to law, in open court, at the time of the entry of the said judgment in the said case, make and file their findings of fact and conclusions of law.”

He further avers in his said special plea as follows:

“The said judgment of the Court of Claims in said case upon the said claim was never impeached or set aside by the said court, nor did the United States, to the knowledge or belief of this defendant, so much as complain to the said court of the said judgment, or of the said findings of fact or conclusions of law, or ask the said court to stay the payment of the said judgment, or attempt to obtain a new trial in the said case, by reason that the said contract on which the said claim was founded and prosecuted was not a valid and legal contract between the said claimants and the Government of the United States, or that the said court had found excessive damages, or that the said judgment or any part thereof was in any particular contrary to the evidence in the said case, or contrary to the law applicable to the same; or that some fraud, wrong, or injustice in the premises had been done to

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the United States, or that some fraud had been practiced or attempted to be practiced in the proof, statement, establishment, or allowance of the said claim, or any part thereof, against the United States; nor did the United States take an appeal in the said case from the said judgment of the Court of Claims, or any part thereof, to the Supreme Court of the United States, and the said judgment has therefore never been in whole or in part reversed or made void; and on or about the 6th day of February, 1874, the amount due by said judgment of the Court of Claims in the said case was duly paid and satisfied to the said claimants by the United States from and out of the specific appropriation which by the accounting officers of the Treasury was found and certified to be applicable to the same, as provided in the seventh section of the act of Congress approved June 25, 1868."

The replication of the plaintiff to the special plea reiterates the allegations of the declaration very much in the same language and particularity, but makes no reply to the proceedings and judgment in the Court of Claims, nor to the averments that Bristow's first connection with the case was in the Court of Claims as counsel, and that his duty was simply to argue the case in that capacity. For this reason the defendant Bristow has demurred to the replication.

It is an established rule in pleading that what is not denied is admitted. If, therefore, the proceedings and judgment in the Court of Claims are well pleaded, the defendant Bristow is entitled to judgment upon the demurrer. The question of jurisdiction in this court to entertain the suit is not dwelt upon, because the statute authorizing the action directs that it can be instituted in the Supreme Court of the District of Columbia. The case is properly here. The question, then, occurs as to the conclusiveness of the judgment in the Court of Claims. That court is undoubtedly one of those which Congress has authority to establish. The Supreme Court of the United States has decided that it exercises the functions of a court of justice, and that its judgments are as final and conclusive as are those of its own when no appeal is taken

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therefrom. (*United States v. O'Grady*, 22 Wall., 647.) Now, it is a general principle of law that a judgment of a court having jurisdiction of the person and of the subject-matter is a final determination of all questions litigated in the cause, and of all questions which might be properly heard and decided upon the issue. It is clear that there is no averment in the declaration either of fraud or of conspiracy that could not have been considered and determined by way of defense in the Court of Claims against these defendants. There can be no illegal combination for the purpose of presenting an honest claim against the government. It is only when the claim is false and fraudulent that a combination to obtain its payment is against the statute. The primary fact to be established is, therefore, the turpitude of the claim itself in order to maintain this action; and the same fact would have defeated the recovery in the Court of Claims, where the judgment was pronounced. No one can fail to see that the character of the claim was a proper and legitimate subject of examination there; and, indeed, one of the main considerations of public policy which led to the establishment of that tribunal was to protect the government by means of judicial acumen from the pretenses of fraudulent claimants. The court has the most ample means of protecting itself from every species of fraud or overreaching. By section 1086 of the Revised Statutes all attempts to practice any fraud upon the United States in the proof, statement, establishment, or allowance of any claim are punished by the absolute forfeiture of the claim to the government; and by section 1088 the court has power, at any time while any claim is pending before it, or on an appeal from it, or within two days after the final disposition of the claim, to grant a new trial and stay judgment thereon where any fraud, wrong, or injustice has been done to the United States. In this case a new trial was not asked for; no appeal has been taken, and the judgment itself has been paid. There seems to have been a thorough examination of the case in the Court of Claims. There was a dissenting opinion by the chief justice, and we know that a

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divided court is more likely to lead to greater search and study than would otherwise perhaps be incurred. As all the matters now set up might have been considered and proved as a defense in that court, and the jurisdiction being unquestionable, the judgment must be held conclusive against the United States and all parties in privity with them.

It is argued that the relator was not a party to that judgment, and is, therefore, not to be affected by it; but the rule applies to all parties claiming under those who were parties in the cause. If my title to real estate has been decided against me by a court of competent jurisdiction, any one to whom I might afterwards convey would be equally bound by that determination. This suit must be brought in the name of the United States, who was the party, and the relator is in the same interest, and is equally concluded with the party he represents. So it is said that Bristow was not a party there and may be sued here. The answer to this is apparent from the plea itself. We have seen that Bristow pleads he was not connected with the claim until the evidence was taken in the Court of Claims; that he was then retained as counsel to argue the cause as an attorney and counsellor at law. This statement is not denied by the replication, and is therefore admitted on the record. It is an unheard-of proposition that this state of facts constitutes him a conspirator within the meaning of the penal statute referred to. It would certainly be a dangerous doctrine to suppose that a lawyer is liable to be prosecuted both civilly and criminally for appearing in a court of justice to argue a cause upon a claim which an informer might allege to be fraudulent, although it had been tried and pronounced valid by an unreversed judgment of a competent court. Such a principle would affect every retainer with insecurity and make the life of an advocate the most hazardous and precarious of all human pursuits.

Another view has been presented in favor of this action, namely, that it is founded upon a statute, and however true the general rule may be in regard to the finality of a judg-

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ment, it cannot apply to a suit authorized by the express terms of the law.

Section 5438, already referred to, prohibits every person from presenting for payment or approval to or by any person or officer in the civil, military, or naval service of the United States any claim upon or against the Government of the United States, knowing such claim to be false, fictitious, or fraudulent, or from making any false voucher or receipt, or from entering into any agreement, combination, or conspiracy to defraud the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim. The object of this statute is apparent. It was to protect the government against fraudulent claims presented to its officers for settlement, and was never designed to apply to the prosecution of claims before a tribunal like the Court of Claims. It can in no sense be called a "person or officer" in the civil, military, or naval service of the United States. We have seen that it exercises the functions of a court, and that its judgments are conclusive *inter partes*. We deem ourselves fortunate in having a government with the three great co-ordinate branches, of which the judiciary is one, and to call it a person or an officer would be to confound the nature of our civil institutions. If Congress had determined to apply this statute to the prosecution of demands against the government in that court, they would undoubtedly have designated it by name. It was organized for the express purpose, and no other, of adjusting and deciding pecuniary demands against the United States. This law has been twice enacted since the court has been in existence, and if they had intended to put it on the same footing with an officer, "civil or military," they would have said so. In the absence of any such language we cannot give this effect to the statute, and for these and similar reasons we think there should be judgment for the defendant upon the demurrer.

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MARGARET KEEFE v. EDMUND MALONE.**EQUITY.—No. 4612.**

- I. This bill was filed in equity by a creditor, for want of personal assets, to subject the real estate to the satisfaction of his claim; the defendant in the suit was the executor, and he was also the devisee of the real estate sought to be reached. The complainant had obtained a verdict in an action at law against the said executor fixing the amount of his debt, but no judgment was entered on such verdict, for the reason that there were no personal assets in the hands of the executor; and it was held that although the executor and devisee were the same person, he was not concluded by the verdict, nor was it evidence against him, because his capacity as executor was distinct from his capacity as devisee.
- II. A verdict in an action at law against an executor or administrator is good only as against personal assets; and if it should appear to the court that there are not assets sufficient to discharge the whole amount, the judgment can be perfected only for such amount as he may have, or if there are other claims entitled to distribution, for a just proportion of the same; and if there should be no personal estate whatsoever, there can be no judgment; and such verdict against the executor cannot be used as evidence in a subsequent suit against said executor in his capacity of devisee.

STATEMENT OF THE CASE.

The complainant filed her bill on the 15th of September, 1875, setting forth the facts that a certain John Malone had died on or about the 1st day of June, 1871, seized and possessed of certain real and personal estate, and leaving a last will and testament, in which, after directing the payment of his debts and funeral charges, and providing for the payment of two legacies of \$5 each, he devised and bequeathed all the rest and residue of his property, real and personal, to his son, Edmund Malone, (the defendant,) his heirs and assigns, and named and appointed the said Edmund his sole executor; that letters testamentary on the estate of the said John were duly issued to the said Edmund, and that under the will he took possession of the real and personal estate of the deceased, and that he had partially paid the debts of the testator; that

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the deceased, at the time of his death, was indebted unto complainant in a large sum; that the executor had refused to pay the same; that she thereupon brought suit against him on the law side of the court, and that on the 9th day of February, 1875, upon the trial, she recovered a verdict for \$1,620 in the said cause, which was numbered 10,795 on the docket of law causes.

The bill further alleged that the said claim was unpaid and unsatisfied; that the personal estate of the deceased was wholly insufficient to satisfy the same; and that unless the real estate of the deceased devised to the said Edmund Malone, being part of lot 14 in square 719, be subjected to its payment, she would be without relief in the premises.

The bill prayed for an account, &c., and for a sale of the realty and the satisfaction of complainant's debt out of the proceeds, and for general relief.

The defendant interposed a demurrer to the bill, assigning for cause, that it did not appear by the bill that complainant had exhausted her remedy against the personal estate of the deceased, nor what amount of said personal estate would be applicable to said alleged indebtedness.

The demurrer was overruled, and the defendant answered, admitting that he had qualified under the will as executor, and had as devisee taken possession of the real estate; that all the personal estate of the deceased which had come into his hands was the sum of \$5; that he had paid the funeral expenses and some small debts of the deceased, and that the complainant's claim was wholly unpaid; that he had spent certain sums for improvements on the real estate devised to him since it came into his possession, and he asked that this amount, with the amount of debts and funeral expenses paid, be allowed him in case of a sale.

He further set up in the answer that on the trial at law a paper-writing, purporting to have been signed by the deceased, was introduced in evidence, and that it was on this written acknowledgment that the jury found their verdict; that he had never seen the paper until the time of the trial, and that

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its production was a surprise; and he further averred that the said paper-writing was a forgery, and that there was no foundation for the claim; that judgment on the verdict is only good against the personal estate, and is no evidence whatever in this proceeding against the real estate; and the answer finally pleaded the statute of limitations.

Upon the hearing at the special term a decree was passed dismissing the bill, and from this decree the complainant appealed.

The case came on for hearing at the last general term, and the court directed a reargument.

Hugh T. Taggart and *Frank T. Browning*, with whom was *W. D. Davidge*, for complainant.

Where there is an insufficiency of assets in the hands of an executor or administrator to pay debts, a court of equity will decree a sale of the real estate which has descended to an heir or been left to a devisee. (*Tyson v. Hollingsworth*, 1 H. & J., 469; 4 G. & J., 295; 10 G. & J., 65.)

In the latter case—*Gibson v. McCormick*—it was held sufficient in the bill to charge the existence of the debt and the exhaustion of the personal estate, and that it is not necessary to provide for the coming in of other creditors, nor to take a preliminary account of the disposition of the personal estate in passing a decree for a sale.

In 4 Gill and Johnson the court says that the personal estate of a deceased debtor is the natural fund for the payment of debts, and must in ordinary cases be first resorted to.

In the present case complainant followed that remedy until it became clear that the personal estate was insufficient. Until this was demonstrated the right of action against the devisee was not complete. (2 Hill Ch., 457.)

The devisee is not entitled to any allowance for improvements. He simply holds the property as a trustee.

In *Gibson v. McCormick*, 10 G. & J., 65, above cited, it is held that a purchaser from a devisee is bound to take notice

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of the existence of claims, and will buy at his own risk. The devisee deals with the property at the same risk.

The devisee is a mere volunteer holding the estate subject to all the equity to which it was liable in the testator's hands. (3 Marsh., 530.)

The defendant is estopped from again putting in issue matters that have been once tried and determined on the law side of the court. He then had the opportunity of making a defense, and the capacity in which he was sued was immaterial. He was the real and only party in interest, and was bound to exhaust his defenses. In doing so he was endeavoring to protect the real estate in his hands from ultimate liability.

As to the estoppel, see 3 Abbott's N. Y. Dig., 461; Big. on Est., p. 26; Freem. on Judg., p. 262; *Chicago v. Robbins*, 2 Black, 423; *Corcoran v. Chesapeake and Ohio Canal Company*, 4 Otto, 741; *Duchess of Kingston's Case*, 2 Sm. L. Cases.

The proceedings on the law side of the court cannot be collaterally impeached. It must be done directly by bill in chancery, petition for new trial, or writ of error. (*Christmas v. Russell*, 5 Wall., 304.)

The plea of the statute can only be insisted upon to the time of bringing the action against the defendant as executor. (*Peck v. Wheaton*, Mort. & Yerg., 353; *Hill v. Tucker*, 13 How., 467.)

In *Hill v. Tucker*, 13 How., 467, the court refers to the case of *Nixon v. Aspden*, 4 How., 467, and to *Stacey v. Thrasher*, 6 How., 44, in which it says that the court treated fully the question as to the privity between administrators deriving their commissions from different political jurisdictions, and held that as between them there was no privity, and discusses the distinctions between the executor of a testator and one called upon to administer the estate of an intestate; and it is held that there is a privity between executors and the same responsibility as to creditors, though they may have qualified in different sovereignties; and the court held that where a man had died in Virginia, owning property in said State and

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in the State of Louisiana, and named certain parties as executors of his will, some of whom resided in one State and some in the other, and who qualified each in their respective States, and a creditor having sued the executors in Louisiana on a judgment recovered against those in Virginia, a plea of the statute would not be allowed. But the language of the will creates a charge upon the land for the payment of debts, and the statute is not a bar in such a case. (*Bank v. Beverly*, 1 How., 151.)

The decree should be reversed; the court should aid the verdict, and a decree be entered for the sale of the land as prayed.

William F. Mattingly, for defendant.

It has been uniformly decided that a judgment at law against the executor is no evidence at all against the heir at law or devisee in a proceeding against the real estate. (*Gaither v. Welch*, 3 G. & J., 256; *Binley v. Staley*, 5 G. & J., 432; *Collinson v. Owens*, 6 G. & J., 4; *Hardwood v. Rawling's Heirs*, 4 H. & J., 126; *Duvall v. Green*, 4 H. & J., 270.)

Although the executor and devisee are the same person, this cannot alter the rule, because in one suit he is a party as executor, in the other as devisee. The subject-matter of the suit is different, being the personal estate in one case and real estate in the other. (*Aspden v. Nixon*, 4 How., 497.)

A court of equity will not lend its aid to enforce the collection of a judgment obtained by fraud and forgery.

Mr. Justice WYLLIE delivered the opinion of the court:

Malone, the defendant, was both executor and devisee under the will of his father. There was no personal estate except a very small amount, and the whole of the testator's real estate was given to him by the will.

The plaintiff brought an action at law against him, as executor, to recover the amount of a debt which she claimed to be due her upon a certain paper, which she set up as having been signed by the testator a short time prior to his death.

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The defendant appeared to the action, and on the trial attempted to show that this paper was a forgery; but the verdict was against him for the amount claimed.

No further proceedings were had in the action, nor was a judgment of any kind ever entered in pursuance of the verdict, for the reason, doubtless, that it was manifest there were no personal assets in the hands of the executor to be reached by such proceedings. The plaintiff having thus obtained a verdict at law against the defendant as executor, subsequently filed the present bill in equity against him in his character of devisee, with a view to subject the real estate to the payment of this debt.

In this suit defendant pleaded the statute of limitations, and disputed also the validity of the complainant's claim. The latter relied mainly on the effect of the verdict, claiming that it was conclusive. The court below held that the verdict was not conclusive, and for other reasons dismissed the bill.

Unless that verdict was conclusive, we think the decree below should be affirmed; for a great preponderance of evidence is against the validity of the claim, and before the institution of this suit it was barred by the statute of limitations.

In *Ingle v. Jones*, 9 Wall., 495, the court say: "It is insisted by the counsel for the appellants that the judgment is erroneous in form, and is in fact only interlocutory. This objection is well taken. According to the statutes of Maryland, which are in force in the county of Washington, the judgment, under the circumstances, should have been entered only for assets as they should thereafter come into the hands of the administrator. But this fact is immaterial. The case is governed by the local law. That law makes the proceeding against the administrator and the heir, when the latter proceeding is necessary, entirely independent of each other. The duties of the administrators are confined to the personal estate, and never beyond it. If that be insufficient to discharge the debts, and it be necessary to resort to the realty of the deceased for that purpose, a proceeding against the

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heir must be instituted. In that event, whatever has been done by the administrator is without effect as to the property sought to be charged. A judgment against the administrator is not evidence against the heir. The demand must be proved in all respects as if there had been no prior proceeding to effect its collection, and the statute of limitations may be pleaded with the same effect as if there had been no prior recovery against the personal representative." (Stats. of Md., 1786, 1798; *Collinson v. Owens et al.*, 6 G. & J., 4; 8 Pet., 528.)

In this opinion the court refers to the local law under the statutes of Maryland for the grounds of its decision in that case, without quoting its language. But since, in the present suit, the defendant bears the duplex character of executor and of devisee, and in the action at law had the opportunity of defending against the claim of the plaintiff, and did make such defense, it is important to ascertain from the statutes exactly the effect of a verdict against the personal representative.

By the act of 1798, ch. 101, sub-ch. 8, sec. 7, it is enacted that "in no action brought against an executor or administrator shall it be necessary for him to plead *plene administravit*, or anything relative to the assets, or for the plaintiff or plaintiffs to reply to such plea." The next section following is in these words: "And if the verdict of the jury on the issue joined be against the executor or administrator, or if he shall be willing to confess judgment, and the debt or damages which the deceased (if he or she were alive) ought to pay be ascertained by verdict or confession, or otherwise, the court before whom the action was brought shall thereupon assess the sum which the executor or administrator ought to pay, regard being had to the amount of assets in his hands and the debts due to other persons; and if it shall appear to the said court that there are assets to discharge all just claims against the deceased, the judgment shall be for the whole debt or damages found by the jury, or confessed, or otherwise ascertained, and costs; and if it shall appear to the court

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that there are not assets to discharge all such just claims, the judgment shall be for such sum only as bears a just proportion to the amount of the debt, or damages and costs, regard being had to the amount of all the just claims and of the assets; that is to say, as the amount of all the said claims shall be to the assets, so shall be the amount of the said debt or damages and costs be to the sum required, for which judgment shall be given."

Section 9 proceeds to provide the instrumentalities and direct the methods by which the objects of the preceding section are to be carried into effect.

The object, therefore, of an action at law against an executor or administrator, in this District, is to reach the personal estate in his hands, and the subject-matter of such an action is the personal assets. If the personal estate be sufficient to pay all debts, the plaintiff may have a judgment for the whole amount of his claim, and a *fiery facias* may be issued and levied upon the personal property of either the deceased or of the executor. If the personal estate be insufficient to pay all the debts, then the judgment will not be for the whole amount of the verdict, but only for a proportional part. If it appear to the court that there is no personal estate whatever, then there can be no judgment for any amount, and that was the case in the present instance. There was no judgment on the verdict, and, under the circumstances, there could be no judgment. And a verdict alone, without a judgment, can never be set up as *res adjudicata* in a subsequent suit.

Besides this, in *Aspden v. Nixon*, 4 How., 407, the Supreme Court of the United States held, in accordance with the view taken by the vice-chancellor in *Burrs v. Jackson*, that to render a former adjudication conclusive, it must be for the same matter, between the same parties, and for the same purpose. This opinion was cited and recognized in *Washington Steam Packet Company v. Sickles*, 24 How., 383.

Other authorities can be found which apply the doctrine of

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estoppel with greater latitude, than this, but this court is bound absolutely by the decisions of its own superior.

The decision in *Corcoran v. Chesapeake and Ohio Canal Company*, 4 Otto, 741, has been pressed and relied on as a later and contrary decision upon this subject. Mr. Corcoran was trustee, named in a deed of trust from the Chesapeake and Ohio Canal Company to secure a large amount of bonds which had been issued by the company. He was also a holder of many of the bonds in his own right. He brought suit in this court, on behalf of himself and others in like situation, to recover arrears of interest which he claimed to be due on these bonds. The same matter had been decided by the Court of Appeals of Maryland in a suit in which he was made a party defendant, in his capacity of trustee, and the decision was against him there. This adverse decision was pleaded by the company in answer to his bill in this court, and it was held by the Supreme Court that the decision in Maryland was conclusive against him here, notwithstanding he was now suing in his individual capacity and the Maryland decision was against him in his capacity of trustee.

But the difference between that case and the one we are now considering is this, and it is fundamental: that in Mr. Corcoran's case the subject-matter of the controversy was the same in both suits, viz., the interest coupons of the company's bonds; in the present case, the subject-matter of the action at law was the personal estate of the testator, and the subject-matter of the suit in equity is the real estate of the debtor.

The reason assigned for holding the Maryland decree conclusive is stated with great force and clearness by Mr. Justice Miller, as follows:

"It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee *in the very matter of the trust for which he was appointed*. If Corcoran owned any of these bonds and coupons then, he is bound because he was representing himself. If he has bought them since, he is bound

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as privy to the person who was represented. (*Kerrison v. Stewart*, 93 U. S., 155.)”

In the present case the defendant is not bound as to the real estate by the verdict in the action at law, because in that action he represented only the personal estate, but in this the real estate is the subject-matter of the controversy.

Decree below affirmed.

BALTIMORE AND POTOMAC RAILROAD COMPANY v.
WILLIAM DENNISON AND OTHERS, COMMISSIONERS
OF THE DISTRICT OF COLUMBIA, AND GALLAHER,
LOANE & CO.

EQUITY.—No. 4218.

The complainant was authorized by act of Congress to cross or intersect with their tracks any established road or street in this District. The District authorities gave a contract to the defendants Gallaher & Co. to construct a sewer which would necessarily pass in its course under the tracks of said railroad where they crossed one of the public streets in Washington. The contractors were near complainant's tracks with their excavation, which it was alleged would endanger the tracks, and prevent their use, unless great care and expense were employed in their protection. There are no averments in the bill that the contractors were doing anything which they were not authorized by law to do, or that they were doing the work in such a careless manner as to interfere with the rights of said railroad company: *Held*—

- I. That while the company, under such acts of Congress, had a right to lay down the tracks of its road at the intersection of the street in question, it was subject to the right of the District to construct a sewer under said street if deemed necessary to the comfort and health of the public.
- II. That the obligation of the contractors, as respects complainant, was to do the work in such manner as not to interfere with the rights of the company.
- III. That the company had a right to run their cars over the tracks of the road at the crossing of the street, and the District had a right to construct a sewer under said tracks; and in the exercise of these respective rights, neither of the parties must do the other any unnecessary damage.

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- IV. That the railroad company, not being a party to the contract for the construction of the sewer, could not invoke the aid of this court to enforce its provisions, especially when the contractors were performing the contract with due care.
- V. That the special term had no jurisdiction to pass an order requiring the contractors to construct the sewer, where it passes under the tracks of the railroad, under the supervision and direction of the engineer of the company.
- VI. That order having been complied with, however, by the contractors, and the final decree making no provision to reimburse them for the extra expense thereby incurred, such final decree is set aside, and an order made appointing a competent engineer to report upon the necessary costs of constructing said sewer in a suitable manner, such cost to be charged to the contractors, and any amount expended above that sum to be paid by the railroad company.

STATEMENT OF THE CASE.

The material facts may be briefly stated :

The Baltimore and Potomac Railroad Company, a corporation created by an act of the Legislature of Maryland, was empowered by an act of Congress to lay down a branch track of its road into this District, and for that purpose passing over such lands and occupying such streets as Congress in its discretion might allow. A route was selected, and sanctioned by Congress. This route, thus approved, occupied a portion of South Capitol street. The corporation completed the road and put it in operation as early as 1872. In 1873 the Board of Public Works entered into a contract with Gallaher & Co. to construct a sewer which, of necessity, would pass under complainant's road. Before the bringing of this suit the Board of Public Works was abolished, and three commissioners, invested with all the powers of that board, were appointed, namely, Dennison, Ketchum, and Phelps; hence they, with Gallaher, Loane & Co., are made parties defendants in this bill. In the progress of the construction of this sewer, the contractors were approaching the complainant's road track, when a bill in equity was filed by the complainant against the contractors Gallaher & Co. and the Commissioners of this District, prohibiting the defendants from carrying off or in any way interfering with the roadway, or soil of the

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road-bed where it crosses South Capitol street, and from the further prosecution of the work of constructing said sewer under the roadway of the complainant, without said defendants providing or causing to be constructed at their own expense a proper and safe temporary support for the tracks and roadway of plaintiff's said road while the sewer was being constructed, and maintaining the same until the sewer was finished. In the contract entered into in writing between the Board of Public Works and Gallaher, Loane & Co., is found the following provision :

"Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances or injuries to individual property, or otherwise, on the line of the work, shall be sustained by the said contractors; and the said contractors hereby agree, in the execution of the said work as aforesaid, to keep at all times the said work properly guarded or protected, so as to prevent all injuries to persons, travellers, animals, or property; and in the event of any such injury or injuries accruing in consequence of the insufficient grading or protection of said work as aforesaid, the said party of the first part shall retain, out of any money or moneys due or to become due said contractors, a sum sufficient to cover all damages arising out of said injuries until the same may be settled at law or otherwise."

In the tenth paragraph of the bill of complaint are found the following allegations, the only ones necessary to be considered :

"Tenth. Your orator further says that the said Hugh L. Gallaher and Joseph G. Loane and H. E. Loane have constructed the said sewer on South Capitol street to within a few feet of the embankment and tracks of its railroad on both sides of its road-bed where it crosses South Capitol street, and that in order to carry the said sewer under the track of complainant's railroad it will be necessary to make an exca-

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vation of the soil about fifty-five feet in width, about fifteen feet in depth, and to extend the said excavation for about the distance of eighty feet, until it crosses the road-bed of the complainant; and prior to and during the excavation it will be further necessary to make certain expenditures in constructing a temporary support for the tracks of the railroad to enable it to use its said road for the transportation of trains along and over the said excavation, and to properly support and protect said tracks until the said sewer is completed; and in order to secure the said road-bed and tracks after the completion of the said sewer from the dangers arising from the existence of the said sewer underneath the same, it is necessary that the said sewer should be constructed at the point where it passes under the roadway of complainant with a heavier arch and with other and additional means of securing the same than the means used elsewhere in constructing the said sewer; and as illustrating the character of the temporary support for the tracks during construction, and the changes which should be made in the mode of construction of the said sewer where it passes under the complainant's roadway, plans of the same are herewith filed, marked 'Complainant's Exhibits B, C, and D,' which are prayed to be taken and considered as part of this bill."

The contractors and Commissioners having appeared and answered the bill, the latter make the following averments:

"And these defendants submit to this honorable court that all and every the matters in the said complainant's bill mentioned and complained of, are matters which may be tried and determined at law, and with respect to which the complainant is not entitled to relief in any court of equity; and these defendants hope they shall have the same benefit of this defense as if they had demurred to the said complainant's bill."

The next proceeding in the case is the following order made by the court:

"This cause having been argued on the restraining order granted in the cause, it is ordered, this eleventh day of March,

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in the year eighteen hundred and seventy-five, by the Supreme Court of the District of Columbia, that the defendants, H. Gallaher, Joseph G. Loane, and Henry E. Loane, the contractors for the construction of the sewer mentioned in these proceedings, be, and are hereby, authorized and required to construct the said sewer under the tracks of the Baltimore and Potomac Railroad where it crosses South Capitol street, under the supervision and direction of the engineer of the Baltimore and Potomac Railroad, and to furnish the temporary support for the tracks of the said railroad company during the construction of the said sewer, under the supervision of the said engineer, in such manner as not to interfere with or obstruct the transit of trains during the construction of said sewer, and in such a manner as to provide a safe transit for the trains of the said railroad company upon the completion of the construction of said sewer. And it is further ordered, that the said contractors keep an accurate account of the cost of the constructing and maintaining a temporary support for the said tracks of the said railroad company while the said sewer is being constructed, and of additional cost of said sewer so as to render the same safe and proper for the transit of the trains of said railroad company after its completion. And it is further ordered, that the question as to the liability for the said cost and expense of the temporary support for the said tracks, and the additional cost of the said sewer so as to render the same safe and proper for the transit of the trains of the said railroad company after its completion, be reserved for determination upon the final hearing and decree, to be hereafter passed in the cause."

Under this order of the court the defendants Gallaher, Loane & Co. went on to construct an arch under the railway of the plaintiff, under the direction of the plaintiff's engineer, in doing which they were compelled to expend in labor and materials some six thousand dollars. The cause coming on for a final hearing, the following decree was entered by the court at special term:

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"This cause coming on for final hearing at the present term, and having been argued by counsel, upon consideration thereof, it is, this 5th day of April, 1877, ordered, adjudged, and decreed that no part of the cost of constructing the temporary or the permanent support of the tracks of the complainant, made necessary by the building of the sewer in these proceedings mentioned, under the road of the complainant where it crosses South Capitol street in Washington city, is properly chargeable to the complainant, and that neither of the defendants in the case has any claim against the complainant, for the cost of such work or any part thereof."

From this final decree an appeal was taken to the court in banc by Gallaher & Co., and also by the Commissioners of the District.

Enoch Totten and J. C. Heald, for complainant.

The road having been fully completed, after an expenditure of large sums of money, on the faith of the statutes of incorporation, those statutes constitute a contract, and cannot be altered or impaired except as provided for by the statutes themselves. (*Dartmouth College v. Woodward*, 4 Wheat., 518; *Piqua Branch Bank v. Knoop*, 16 How., 369; *Dodge v. Woolsey*, 18 How., 331; *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Milhan v. Sharp*, 27 N. Y., 611. See the authorities collected on this point in Abbott's Dig. L. of Corp., 156.)

The title to the streets of Washington is vested in the United States; and the privilege of using the streets for the purpose of railroad traffic having been granted to the complainant by the United States, its right to the free and uninterrupted use of them, as authorized by the acts of Congress, cannot be interfered with, modified, or diminished by the municipality. The act establishing the "District of Columbia" constitutes it "a body corporate for municipal purposes," and authorizes it to "sue and be sued, plead and be impleaded with, have a seal, and to exercise all other powers of a municipal corporation not inconsistent with the Constitution and

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laws of the United States and the provisions of this act." The eighteenth and nineteenth sections of the organic act expressly prohibit the legislative power from passing any law "impairing the obligation of contracts." The municipal corporation is strictly limited by these provisions from making encroachments upon the rights of property of private individuals or corporations. Indeed, the legislative power seems to have been unusually careful to protect the railroad company against invasions of its rights on the part of the municipality. It is especially provided that it shall not have the right or power to change the grade of the streets over which the road passes without the aid of a congressional enactment. The proviso to the third section of the act says that the "level of the said road * * shall conform to the present gradation of the streets, *unless Congress* shall authorize a different level." And, in addition to this, the provisions of the act of incorporation granted by the Legislature of Maryland prohibiting, under a penalty, any destruction or obstruction of, or injury to, any part of the railroad, was extended by the act of Congress to the company for the protection of that part of its road located in the District. The act provides that the company shall have the same benefits and immunities in the use of its road in the District as are provided by the said original charter. These provisions were plainly intended to protect the road in the District from injury, destruction, or obstruction, in the same manner as it is protected in Maryland; and unless some positive statute of the United States to the contrary can be produced, the municipal authorities are forbidden, not only to injure, obstruct, or destroy any part of the road, but they are also forbidden to change the grades of the streets over which it passes.

It will not be seriously denied that an excavation fifty-five feet long, eight feet wide, and fifteen feet deep under a railroad track must very materially injure as well as interfere with the operation of the road, and greatly diminish the value of the franchise. If the municipality can dig an excavation of these dimensions under the road-bed at South Capitol

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street at the expense of the company, it can excavate in the same way under the entire length of the road within the limits of the corporation, and thus not only impair and injure the road, but entirely destroy the franchise of the company and the contract under which it exists.

The act of Congress of February 5, 1867, provides:

“That whenever the said company, in the *construction* of a railroad into or within the said District, as authorized by this act, shall find it necessary to cross or intersect any *established* road, street, or other way, it shall be the duty of the said company so to construct the said railroad across such *established* road, street, or other way as not to impede the passage or transportation of persons or property along the same.”

These provisions are copied, substantially, from the original act of incorporation by the State of Maryland. This is the only provision bearing directly upon the question here. It will be observed that nothing is said about sewers; but even if sewers were especially mentioned, there could be no constructive obligation imposed upon the company to bridge this sewer. If a new street should at any time be opened across the line of the road by the municipal corporation, the company could not be required to construct the necessary bridges. It was so held, after much argument, in the case of *Morris Canal Co. v. The State*, 14 N. J. L., 62. (See, also, *In re Trenton Water Power Co.*, 20 N. J. L., 659; *The King v. Kerrison*, 3 M. & S., 526; *The King v. Inhabitants of Lindsey*, 14 East, 317.)

A. G. Riddle, for District Commissioners.

1. The court erred in this ruling.

It is submitted that the claim of the plaintiff, though recognized by the Equity Court, rests in an entire misconception of the case.

In the first place, although the fee in the streets was in the United States, yet it, and the whole territory of which they were a part, had, long before the claim of plaintiff existed, been dedicated to the purposes of a city, and charged with all

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the servitudes necessary to accomplish all municipal purposes, among which sewers and sewerage are repeatedly mentioned in the city charters. With this pre-existent dedication to specific and permanent purposes, Congress granted the right of way over the named streets to the plaintiff for the purpose of its track, thus adding another burden to the soil.

What was the effect of this grant? Merely to legalize the presence of plaintiff's track, cars, and noise. That which, without license, would have been an intrusion, an intolerable nuisance, becomes lawful and escapes abatement.

The plaintiff's claim is, that by this grant it acquired a right paramount to all the older rights of the municipality; that they are subordinated to it, and can in no way approach, or in any way interfere with, its exclusive property, except at the cost of full protection to it. We claim that the premises were already dedicated to the public, and this grant to a private corporation must be so construed as to least impair the rights of the public.

Such are the reason and equity of the case, and current of all the cases. (*Charles River Bridge v. Warren Bridge*, 12 Curt., 496; 11 Peters, 445; *Perrine v. C. and Del. Canal Co.*, 18 Curt., 82; 9 How., 182; *Curtis v. Butler*, 24 How., 435; *Moran v. Miami Co.*, 2 Black, 72; *Binghamton Bridge*, 3 Wall., 51.)

The position of the plaintiff is that of bare right, reasonably restricted so as to least interfere with the rights of others. It can lay its rails along the streets, but not so as to destroy the prior and paramount right of the public to use them as streets. It must not render them useless for that purpose, and must transact its business with the least annoyance and disturbance to the people along its route. When the grade of the streets is changed, it must unquestionably conform to the new grade. (*Water Commissioners v. Hudson*, 2 Beasley, 420; an instructive case, and it lights up many points of ours.)

When the plaintiff entered upon the lines of these streets, it knew perfectly well that it was liable, at the discretion of the municipality, to have the earth excavated from under

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and across its track for a sewer, and was bound to govern itself accordingly. In the prosecution of their contract, making their excavation and arch, what are Gallaher, Loane & Co. bound to do? In what way different from the ordinary case, where a party, in prosecution of a lawful purpose, approaches the property of another, are they bound to comport themselves?

The rule which governs the excavation made by a man for the improvement of his own property, near to or adjoining the property of another, it is submitted will govern in this case. He shall conduct his work with the care and skill of a prudent man, and so as to do as little injury to another as may be.

What other or better right can the plaintiff have in the premises than an owner of the fee, a private person, who is obliged to care for his own property? (2 Wash. on Real Prop., 331, 332, and cases cited in notes.)

It is not claimed that Gallaher, Loane & Co. were not conducting their work with ordinary skill and care, but that they refused the extraordinary care and expense of the protection of the plaintiff's property, which by law devolved upon itself.

2. The case of the plaintiff seems to be shaped and the action of the court below governed by the sixth paragraph of the contract of the Board of Public Works with Gallaher, Loane & Co. That seems to have been regarded as a contract to which the plaintiff was a party, and who was, in effect, permitted to compel a specific performance of it against Gallaher, Loane & Co.

It is submitted that, as between the parties to this suit, the provisions of paragraph 6 of that contract can have no influence. It is as if they were not. The whole scope and purpose of that stipulation was to protect and save the District from all legal damages which the execution of the contract might expose it to by any carelessness or misconduct on the part of Gallaher, Loane & Co. It creates no new liability, confers no new right on any party whose property may be claimed to be affected by the construction of said sewer. If

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such claim should be made, the District may retain from Gallaher, Loane & Co. money enough to pay the same, when judicially ascertained. It was strictly between the Commissioners and Gallaher, Loane & Co., in which no other parties have any rights or interest.

3. In this view of the case it was not a proper subject for a court of equity. The plaintiff should have cared for its own property when it received notice, and brought its action at law for any alleged damage.

This case is a matter of grave importance to the District; and if this suit can be maintained, it is not seen how it can escape an injunction at the suit of any party who may think his property insecure, or who may fear he will be subjected to inconvenience by the construction of the most needed and important improvements.

Montgomery Blair and Woodbury Blair, for Gallaher, Loane & Co.

I. The complainant predicates the demand alleged in the eleventh paragraph of the bill, and which the decree enforces, entirely upon the sixth article of the contract between the Commissioners and their co-defendants, as set out in the eighth paragraph of the bill. The decree therefore proceeds altogether upon the assumption that by that article the contractors had bound themselves to do the work which the court ordered them to do at the instance of the complainant. This construction of the article, the defendants insist, is erroneous, and that the article does not apply to the work in question at all. The article only declares that in case certain losses therein enumerated shall accrue *in the prosecution of the work therein described*, "*such losses shall be sustained by the contractors.*"

The losses contemplated are all such as may arise from natural causes in the progress of the work, or be occasioned by the negligence of the contractors. They are enumerated as follows:

1st. "Losses arising out of the nature of the work." 2d.

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"From unforeseen obstacles or difficulties." 3d. "From the elements." 4th. "From incumbrances or injuries to individual property." 5th. Losses arising from "insufficient guarding or protection of said work." All these, it will be seen, are *losses*, and losses which may accrue in the prosecution of the work specially described in the contract. But the expenditure in question here was not made on account of any of the losses enumerated, or, indeed, of any loss whatever, or even on account of the work described in the contract at all, but for work additional to and entirely distinct from that stipulated for in the contract, and which was not contemplated or required by the Commissioners, but ordered by the court for the complainants for their own use and security.

II. If this work had been necessary to fulfill the contract, the complainants not being parties to it, the court erred in enforcing it at their instance.

Mr. Justice OLIN delivered the opinion of the court:

We have no doubt that a court of equity, according to the facts stated in the bill of complaint, had no jurisdiction in this case. It is nowhere averred in the bill that the defendants were doing or threatening to do anything which by law they were not authorized to do, or that they were doing the work in such a careless manner as to unnecessarily interfere with the rights of the complainant.

Undoubtedly the complainant had the right to lay down the track of its road where at present located under and in pursuance of the acts of Congress passed for that purpose; and it is equally clear that the Board of Public Works or the Commissioners of the District had a right to construct a sewer, if deemed necessary for the comfort or health of the people of the District, under the track of the complainant. The only obligation imposed upon the Commissioners or Gallaher, Loane & Co., was to do the work of constructing the sewer in such manner as not unnecessarily to interfere with the rights of the complainant. In other words, the complainant has the right to run their cars over the track of their road;

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the District has the right to build a sewer under the track of complainant's road; in the exercise of these rights neither party must do the other any unnecessary damage.

The complainant was no party to the contract made between the Board of Public Works and Gallaher, Loane & Co., for the construction of this sewer, and had no more right to interfere with its execution than had every traveller who had occasion to pass over the public street upon which the track of the complainant's road was laid. The complainant had no exclusive right to the use of the street. It had, at most, an easement to be enjoyed in common with the public.

We have before stated that we were of the opinion that a court of equity had no jurisdiction in this case. Conceding all of the facts stated in the bill to be true, whether the defendants ought to have appealed to the court in banc from the first order made in this case at special term, it is now unnecessary to inquire.

Probably that order was not an appealable one, as it did not necessarily involve the merits of the action. Such interlocutory orders, when they affect the merits of the case, may be considered on the hearing of a final decree, or reviewed on appeal to the court in banc. The first order made in this case by which the contractors, Gallaher & Co., were turned over to the tender mercies of the engineer of the complainant, and compelled to build such an archway under the railway track as he should direct, is an exemplification of the old fable, in which it is said a lamb was handed over to a wolf to be nursed. Under this order the contractors, under the direction of the engineer of the complainant, expended an amount of money seemingly sufficient to have built a railroad half-way through the District.

We think the decree in this case should be reversed, and an order made appointing some competent engineer to take proofs of the reasonable and necessary costs of constructing a sewer under the tracks of the complainant's road, and the amount found necessary for that purpose to be paid by the

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contractors, and the amount expended above that sum should be paid by the complainant.

LESTER A. BARTLETT AND JOSEPH WILLIAMS, TRADING UNDER THE NAME OF BARTLETT & WILLIAMS, TO THE USE OF LESTER A. BARTLETT, v. THE DISTRICT OF COLUMBIA.

AT LAW.—No. 15,521.

In declaring upon contracts with the Board of Public Works, it is not necessary to aver that such contracts were in writing, and that a sum of money had been previously appropriated by law for the work embraced in the contracts. These are matters which come more properly by way of defense from the other side.

STATEMENT OF THE CASE.

There are two special counts in the declaration. The first set forth that on June 27, 1872, plaintiffs entered into a *contract* with the Board of Public Works of the District of Columbia to grade Maryland avenue, between Third and Seventh streets southwest, in the city of Washington; said work to be done in accordance with specifications annexed to said *contract*; and said board agreed to pay the plaintiffs for doing said work thirty cents a cubic yard for such grading, &c. And it is then averred that the board agreed that they would perform all the stipulations of said contract, and would pay the plaintiffs in lawful money the amount which might be found from time to time due plaintiffs according to contract; that the amount found due to plaintiffs under said contract was \$44,690.82, of which amount \$18,463.48 are still due and unpaid. Plaintiffs further aver the faithful performance by them of the contract.

Second count. Plaintiffs sue defendant for that: January 7, 1874, plaintiffs entered into a contract with the Board of Public Works in and for the District of Columbia to grade

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North Capitol street, between L street north and New York avenue, Washington, D. C., said grading to be done in accordance with specifications annexed to said contract; and the said Board of Public Works for said District agreed to pay plaintiffs for doing the said work thirty cents for each cubic yard of grading, &c.; and said board did further agree with plaintiffs to perform all the stipulations of said contract, and to pay plaintiffs the amount which may be found due them according to contract. The amount found due plaintiffs under this contract was \$28,464.68, of which amount \$9,678 are still due and unpaid.

Plaintiffs aver that, in all respects, they have faithfully performed their part of said contract, and are entitled to receive said balance.

The common counts are added, with particulars of demand.

The defendant, the District of Columbia, demurs to the special counts because they contain no averment that said board made either of said contracts in writing, signed by the parties, or after a sum of money had been appropriated by law for said improvements. The thirty-seventh section of the organic act provides, among other things, that—

“All contracts made by the said Board of Public Works shall be in writing, and shall be signed by the parties making the same; and a copy thereof shall be filed in the office of the secretary of the District.

“And said Board of Public Works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made.”

Section 15 contains the following:

“SEC. 15. *And be it further enacted*, That the Legislative Assembly shall never” * * * “authorize the payment of any claim, or part thereof, hereafter created against the District, under any contract or agreement made without express authority of law; and all such unauthorized agreements or contracts shall be null and void.”

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The demurrer is heard at the general term in the first instance.

I. G. Kimball and J. M. Wilson, for plaintiffs.

William Birney, for the District of Columbia.

In the case at bar, the Board of Public Works was a creation of the statute; it could make a contract binding upon the District by following strictly the mode pointed out in the statute. In all other cases its contracts were void. The law does not, therefore, imply the validity of the contract except where the declaration avers that it was made after an appropriation law authorizing the improvement contracted for. In the absence of that averment, the law implies that the contract is void.

The Board of Public Works was of purely statutory creation; its contracts were unknown to the common law; the statute directs that its contracts shall be *in writing*, and *signed by the parties* thereto; hence, under the rule, the plaintiff shows no right unless he alleges the contract to possess those features which are essential to its validity. A contract which is the creature of the statute must be alleged to be what the statute requires; otherwise, the plaintiff has not shown what is essential to the right he asserts.

It is true that when a contract is known to the common law, the declaration need not allege it except in the most general terms. If a statute has made exceptions to the common-law rule, the defendant must plead specially, or bring himself within the exceptions by evidence on the trial.

Examples: Plaintiff sues upon a promise for consideration. If it is for the debt of another, and not in writing, defendant must plead that specially under the statute of frauds.

If a plaintiff sues an executor for a debt due from his testator, the declaration need not aver that the promise is *in writing*, if such even be the fact. Defendant must plead the negative specially.

If A sues B for necessities furnished his "son," the decla-

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ration is demurrable. The law will not presume that the "son" is a minor.

C applies for an injunction to prevent the levy of a county tax. His bill states that he is a resident of the county. It is demurrable. He should state that he is a property-holder, liable to assessment of the tax. He must show his right to relief.

If a party claim by inheritance, he must show how he is heir.

If he claim real estate, he must allege title.

In the case at bar, plaintiffs allege a universal term under which they can take nothing, instead of a particular term which alone can show their right.

A condition precedent must be alleged in the declaration.

By the COURT:

In declaring upon a contract which is set forth in terms, it is necessarily shown to be in writing. If it is alleged to be a bond or promissory note, it cannot be otherwise than in writing. The contract may, however, be set forth according to its legal effect only, in which case it is not necessary to state that it was in writing. This is the rule in regard to all contracts good at common law. The act of Congress requires all contracts with the Board of Public Works to be in writing and signed by the parties. Now, why should it be any more necessary to aver in the declaration that it is in writing, than it would be in declaring upon a contract within the statute of frauds? They both relate to a species of well-known contracts, and require certain formalities in their form and execution. Contracts for repaving and grading streets are as ancient as our municipalities, and as well known as those within the statute of frauds. It is conceded that the law will imply that the latter are in writing, whether that fact is alleged or not in the declaration, and will leave the defendant to plead it by way of defense. (1 Chit. Pl., 221, 222.) We think the rule is the same here. We are also of opinion that the want of an appropriation of a sum of money for the

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work embraced in the contracts will come more properly from the defendant, and that therefore it was not necessary to state the fact in the declaration.

We overrule the demurrer, with leave to the defendant to plead over as he may be advised.

WILLIAM GUNTON v. W. C. ZANTZINGER AND JOEL C. GREEN, PETITIONER.

EQUITY.—No. 995.

An Equity Court does not insure the title to real property sold by a trustee under its decree, and the purchaser at such sale assumes all unpaid taxes thereon, unless express provision is made by the court for their payment.

STATEMENT OF THE CASE.

In this case there was a bill filed by Gunton for the settlement of his account as trustee under the will of Harriet Fischer, deceased; and in the course of proceedings an order was made directing Gunton, trustee, to sell certain real estate; and at the sale (A. D. 1871) the petitioner, Joel C. Green, purchased some of the land. The price was paid in due time, and the trustee conveyed the land to the petitioner. Some four years after the sale (A. D. 1875) the collector of taxes demanded payment of a tax on the land levied fourteen years before (A. D. 1861). The petitioner paid it, and by this petition seeks to be reimbursed the amount. The case stands upon petition and answer. No proofs have been taken.

This is an appeal from the special term dismissing the petition.

John W. Frazee, for petitioner, Joel C. Green.

The petitioner relies upon the fact that equity will correct mistakes, and make contracts conform to the true intent and meaning of the parties. (See Sugden's Vend. and Pur., 288,

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289; Story on Sales, sec. 145, p. 117; 3 Sandford's S. C., (N. Y.,) 123, 124.)

John D. McPherson, for Gunton, trustee.

If the sale be a judicial sale, still the court has no jurisdiction. It may be admitted that, if the matter were yet *in fieri*—if the price had not been paid, or the purchase-money were yet in court—the court might have jurisdiction. But in this case the land has been conveyed, and the proceeds accounted for by the trustee and paid away under the direction of the court. The court has no longer control of either the land or the money.

It is true the trustee holds other property of the estate, and may hereafter be in funds to pay the petitioner's demand, if the court shall so order. But it is submitted that, under the circumstances just stated, the petitioner stands in no better position than any other person having demands against the estate; and this court does not undertake to decide upon the demands of general creditors, but leaves them to establish their demands by recourse to the appropriate tribunals.

The petitioner, upon the merits, is not entitled to any relief. "The rule of *caveat emptor* applies in all its rigor to judicial sales of real property." Rorer on Judicial Sales, sec. 459, citing, among other cases, *The Monte Allegro*, 9 Wheat., 616, and *Anderson v. Foulk*, 2 H. & G., 346, in which case the chancellor says:

"In England it would seem to be usual, in sales under the authority of the court, to offer a good title to the bidders; and hence the references to a master, at the instance of a party or of the purchaser, of which we read so often, to ascertain whether a good title can be made or not. But in this State it has always been the established law of the court in such cases to sell all the right and title of the parties to the suit, whatever that may be, and nothing more. In all judicial sales under orders or decrees of this court, the rule *caveat emptor* has been applied; and consequently no examination into the title after the sale is necessary, or can be called

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for by the purchaser, whatever may be its latent or patent defects. But if the trustee make any promises or representations to the bidder before the sale that the estate shall be or is clear of all incumbrances; and that the title is better or different from that to be traced from the proceedings, and any such claim should afterwards be set up, the sale would be annulled; but the relief would be granted to the purchaser on the ground of misrepresentation or fraud, and not on that of a mere defect of title, as in cases between party and party." (*Osterburg v. Union Trust Company*, 3 Otto, 428.)

And again, says Rorer, section 462: "In the absence of misconception and fraud the buyer must look out for himself. He buys at his own risk, both as to title and as to quality. The rule does not, however, apply in case there be fraud. And it has been holden in Pennsylvania that the rule applies only to open defects, and that as against secret defects in a title a purchaser will be protected." For the Pennsylvania doctrine, the writer refers to *Bank v. Ammon*, 27 Penn. St., 172, which, being examined, is found to be a case in which, though the doctrine was involved, the decision was upon a different ground.

By the COURT:

The petition is presented by a purchaser of some real estate sold in this cause by a trustee under a decree of this court. After a deed had been made and delivered to the purchaser, and the price of the land had all been paid, the purchaser discovered that a tax, assessed upon the property in 1861, was unpaid, and remained a charge against the land. It amounted to about \$64, and the collector had advertised the premises for sale to satisfy the tax, when the petitioner paid the same in order to prevent the threatened sale. He now petitions the court to be reimbursed that amount.

We do not see how we can grant him any relief. The Equity Court does not insure the title to property sold under its decree unless express provision is made for that purpose. The purchaser must, therefore, look to the title himself. If

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there are unpaid taxes at the time of the sale, the purchaser assumes them, unless the court has provided for their payment. In this case there is no fund in court out of which to make an allowance to the petitioner, even if the court have the power to make it.

The decree is affirmed.

WILLIAM DENNISON, JOHN H. KETCHAM, AND SETH L. PHELPS, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND THEOPHILUS E. ROESSLE, v. JAMES GAVIN, WILLIAM F. DOWNEY, JAMES KELIHER, GEORGE BOYD, THOMAS FREESTONE, THOMAS MOORE, GEORGE O'DAY, AND OWEN WOODS.

EQUITY.—No. 5534.

- I. An ordinance of the board of aldermen and common council of the late corporation of Washington, which has not been repealed or modified by act of Congress, or by the Legislative Assembly, is still in full force. (Rev. Stat. Dist. Col., sec. 91.)
- II. The act of the Legislative Assembly of August 23, 1871, for regulating hackney carriages, does not delegate any power to the Board of Public Works to abolish hack-stands established by law; and the District Commissioners are equally incompetent to exercise such authority.
- III. The court has no jurisdiction to enjoin an act authorized by law.

STATEMENT OF THE CASE AND DECISION.

This is an appeal from two cases consolidated by consent of the parties. A statement of the case in which the District Commissioners are complainants will present the material facts upon which they both depend.

The defendants are the owners of public hacks licensed in the District of Columbia, and they occupy a stand on Vermont avenue, between H and I streets northwest, in the city of Washington; and this place has been occupied as a hack-stand by defendants' and other licensed hacks for about eight

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or nine years last past. An ordinance of the late board of aldermen and board of common council of the city of Washington, approved February 28, 1870, enacted "that a hack-stand be, and is hereby, established on Vermont avenue, between H and I streets, for the accommodation of all hackmen who have paid license in conformity with existing laws." This is the same stand now occupied by defendants. Section 91 of the Revised Statutes for this District provides that all laws and ordinances of the cities of Washington and Georgetown respectively, and of the Levy Court of the District of Columbia, not inconsistent with such statute, and except as modified or repealed by Congress or the Legislative Assembly since June 1, 1871, or until so modified or repealed, shall remain in full force. The above ordinance has not been repealed or modified by act of Congress. The Legislative Assembly has not done so in terms. The defendants, therefore, claim that they have a legal right to occupy said hack-stand as aforesaid, and that this court has no jurisdiction in the case, as the remedy of the complainants, if they have any, is in a court of law.

The complainants are the Commissioners of the District of Columbia, and T. E. and T. Roessle are joined with them as co-complainants. The latter complain that they are specially injured in their business as keepers of the Arlington Hotel, situated on said avenue, from the daily assemblage of horses and hacks on said stand adjacent to said hotel.

The Legislative Assembly passed an act on the 23d of August, 1871, to regulate hackney carriages, the last section of which repeals all acts or parts of acts inconsistent therewith. This act provided that the location of hack-stands should be designated by the Board of Public Works as in their opinion the interest and convenience of the public demand. The Commissioners contend that by act of Congress approved June 25, 1874, they acquired all the power and authority vested as above in the Board of Public Works, and that by virtue thereof they passed an order bearing date

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March 1, 1877, that the said hack-stand be abolished, and that the exercise of this power was legal and reasonable.

The question presented upon this state of facts is, whether the District Commissioners had authority to set aside the city ordinance establishing the hack-stands, and whether this court had jurisdiction, in case that ordinance was still in force, to enjoin the defendants on the ground that they were creating an obstruction or nuisance on the avenue. The special term decreed that the injunction prayed for by the complainants be allowed; and from this decree the defendants have taken this appeal. The general term reversed the decree, and expressed the opinion that the ordinance of 1870 was still the law by virtue of the Revised Statutes, which expressly declare that the ordinances of the cities of Washington and Georgetown should remain in full force until repealed or modified. It is true the Legislative Assembly, by the act of 1871, had given the Board of Public Works authority to designate hack-stands; but they did not, and indeed could not, delegate any power to the board to abolish hack-stands established by law, and the Commissioners are equally incompetent. The ordinance having still the force of law, the court has no jurisdiction to enjoin any act which it authorizes.

A. G. Riddle, for complainants.

John E. Norris and *N. H. Miller*, for defendants.

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CHARLES C. TOMPKINS AND JOHN S. RUNKEL v. M.
MANDEL ET AL.

EQUITY.—No. 3649.

- I. The Commissioners of the District of Columbia do not succeed the late Board of Public Works as parties to a bill in equity, where no process has been issued or served upon them; and a rule upon them to show cause in such suit will be discharged.
- II. The District Commissioners have no authority to deliver to any person certificates turned over to them by the late Board of Audit under the joint resolution of Congress approved March 14, 1877. (Stats. 1876, 1877, 211.)

STATEMENT OF THE CASE AND DECISION.

There are two cases, but the facts in one only will be stated, as they are the same in both.

The complainants were contractors under the late Board of Public Works of the District of Columbia, and had performed work under contracts with said board, for which several certificates had been issued to them; that the complainants endorsed said certificates and hypothecated them with the defendant Mandel as collateral security for a loan of money; that the defendants Cowdrey, Hume, and Moses purchased said certificates at market rates and in good faith; that such certificates were considered negotiable paper, and said defendants considered them as commercial paper having a regular market value. The complainants ask to redeem them upon paying the amount advanced by Mandel. A supplemental bill was filed setting up that the certificates had been presented to the Board of Audit, and also for the purpose of bringing in other parties. Subsequently the bill was twice amended, mainly for the same purpose. The Board of Public Works were made defendants, but were not served with process under the supplemental or amended bills, nor were they served with notice of the filing of the same. The District Commissioners were never made parties, nor were they served with process in the suit, except that on the 5th

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of February, 1877, an order was passed at the general term requiring them to deposit in the office of the clerk of this court, to the credit of the cause, several of the certificates in controversy, which had come into their possession under the following circumstances: A portion of the certificates pledged with Mandel as aforesaid had been presented to the Board of Audit for conversion into certificates of the latter board. Under the joint resolution of Congress approved March 14, 1876, (Stats. 1876, 1877, 211,) the powers of the Board of Audit, including the power to issue certificates, were abolished, and it was enacted that after the expiration of thirty days from the approval of said joint resolution all books, papers, and records of the Board of Audit were to be turned over to the Commissioners of the District, or to their successors in office. The certificates in question, with other papers and records, were turned over to the Commissioners by virtue of this legislation. The second section of the joint resolution already referred to provides that there shall be no increase of the amount of the total indebtedness at that time of the District, and that any person who shall aid or abet in the increase of such total indebtedness shall be guilty of a high misdemeanor, and shall be liable to imprisonment not exceeding ten years, and a fine not exceeding \$10,000. Under these circumstances, the complainant's solicitor obtained from the court a rule that the Commissioners show cause why they had not complied with the terms of the decree passed on the 5th of February, 1877, requiring them to deposit in the office of the clerk the certificates aforesaid. To this rule the Commissioners made answer, stating the facts as already mentioned, and also claiming that they do not represent the Board of Public Works in this action, and that they are not bound to make answer to the original and amended and supplemental bills until served with process as parties, and that no decree can be made against them in this case; that the certificates are void as being irregularly issued by said Board of Audit and cannot legally be delivered to any one, and that the power to issue said certificates was abol-

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ished by the act of Congress of March 14, 1876; that they do not hold said certificates for the benefit of the parties to this suit, and that they have no right or authority to deliver the certificates to any person without an act of Congress to that effect.

At a day subsequent to the argument, the general term decided that the District Commissioners were in no sense parties to the suit; that when the Board of Public Works was abolished, the Commissioners not having been substituted in their place on the record, and not having had any notice of the bills filed in the cause, they could not be called upon to show cause, as required by the rule of court. The court also decided that when the Board of Audit was abolished the statute directing all their records and certificates to be turned over to the Commissioners of the District gave the latter no authority to issue or deliver such certificates to any other person.

The rule was discharged.

J. Carter Marbury, for the complainants.

Joseph H. Bradley and *L. G. Hine*, for defendants.

FRANCIS X. DANT v. THE DISTRICT OF COLUMBIA.

AT LAW.—No. 9463.

- I. When the defendant moves the court for a new trial at the general term in the first instance, for the reason that the evidence is insufficient or the damages excessive, a case containing all the evidence should be settled and signed by the justice who tried the cause.
- II. In an action for negligence, the defendant is not liable for damages when the plaintiff's fault contributed to the injury.

STATEMENT OF THE CASE.

This was an action on the case for negligence of the defendant in regard to a street or highway in the city of Wash-

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ington. The plaintiff alleged in his declaration that the defendant was bound to keep Delaware avenue in repair as a public highway for safe and convenient passage; that on November 14, 1871, it was out of repair and in a dangerous and unsafe condition by reason of defendant's negligence, and that the plaintiff, while using due care and lawfully passing over, and in the middle of said highway, in the night-time, fell into an excavation left unguarded through defendant's negligence, and received certain injuries. Defendant pleaded the general issue, and also a special plea that it was not intrusted with the care of, and had no control over, the avenue mentioned in the declaration at the time of the occurrence of the alleged accident.

The testimony on the trial is contained in a case, and is to the effect or substance that the plaintiff, on the evening of November 14, 1871, reached his home on Fifth street, between L and M streets northeast, by a route which he habitually traveled, and which was, in fact, perfectly safe. His wife informed him that his son was ill, and that he must go immediately to the apothecary's for medicine. He started at once for an apothecary shop on the corner of H and North Capitol streets, intending to proceed along the route he had just passed over in coming home. The night was dark and rainy, and, missing his way, he turned into an alley, supposing it to be I street. This alley was intersected by Delaware avenue, the surface of which, on the west side, had been cut down, leaving the other side of said avenue at its old grade—on a level with Second street, and with a continuous surface thereto. The plaintiff, proceeding in haste along the alley above mentioned and over the east side of Delaware avenue, fell down the embankment formed by the lower grade on the west side of that avenue. He knew that the cut was there. He had passed it as often as twice a day for three years. He would not have gone up there but for the darkness, for he was aware that even in the day-time, if he had gone up the alley, he could not have gone through.

The excavation in the avenue was made by the late corpo-

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ration of Washington in 1870, and prior to the act of February 21, 1871, entitled "An act to provide a government for the District of Columbia," (16 Stat. at L., 419,) repealing the charter of the city of Washington and creating a municipality called the District of Columbia.

There were other unobstructed routes by which the plaintiff could have reached his destination. On the western side of Delaware avenue there was a sidewalk, and about one-half of the avenue was in a condition for travelers alongside of the place of the accident. All the instructions asked for by defendant's counsel were granted by the court, and the jury returned a verdict in favor of the plaintiff for the sum of \$5,000.

Upon the rendering of this verdict a motion was made for a new trial upon the judge's minutes, on the ground that said verdict was contrary to law and the evidence in the case, that the damages were excessive, and that the jury disregarded the instructions of the court. The motion was overruled, and defendant's counsel excepted and took an appeal to the general term. A case to move for a new trial at the general term was then prepared, containing all the evidence taken on the trial, and which has been duly certified by the presiding justice. The plaintiff's counsel excepted to the signing and sealing of the case, and this is one of the questions to be determined.

Walter Davidge and *R. Fendall*, for plaintiff.

William Birney, for defendant.

By the Court:

The question as to whether the evidence was insufficient to support the verdict, or the damages excessive, is properly presented in the case settled by the justice who presided at the trial. How can we determine whether it is sufficient unless it is submitted to our examination? An exception only presents a single ruling or decision for review, and brings up the testimony necessarily affecting that point. A

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case is, therefore, allowed as well as a bill of exceptions. When a motion for a new trial upon the minutes of the judge is denied, an appeal is expressly given by the statute to the general term, and then a *case* or bill of exceptions is to be settled in the usual manner; (Rev. Stat. D. C., sec. 805;) and when the motion is made for any reason requiring an examination of the whole evidence, the expedient of a case must be resorted to instead of a bill of exceptions. A case containing all the testimony is the proper practice when the motion for a new trial is founded upon its insufficiency, or where the damages are excessive. In no other mode can the legal effect of the evidence produced at the trial be determined in a review of the verdict.

The court are also of opinion that the state of facts presented by the evidence constitute a state of mixed fault or contributory negligence, and that the District is not, therefore, responsible in damage. A new trial is ordered.

HUMPHREYS, J., dissented.

THOMAS C. BASSHOR ET AL. v. HALLET KILBOURN.

EQUITY.—No. 4649.

A married woman was seized of property against which a claim for a mechanic's lien was filed, entitled against the husband in this form, "*Thomas C. Basshor & Co. v. Hallet Kilbourn*," and recites that it is the intention of said company "to hold a lien upon the property of Hallet Kilbourn, being his dwelling-house situated at the intersection of K and Seventeenth streets, on lot — in square number 164, for the amount due," &c. : *Held*, That the description of the premises intended to be covered by the lien was not sufficient, and that no lien existed by reason of such notice.

STATEMENT OF THE CASE.

The bill in this case is filed to enforce a claim for a mechanic's lien on lot 1 in a subdivision of part of square 164, in this city.

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The pleadings and proofs disclose the fact that Kate R. Kilbourn, a married woman, and the wife of the co-defendant, Hallet Kilbourn, was seized of the property in question at the time when the complainants placed in it the heating apparatus for which the lien is claimed. Previous incumbrances had been placed upon the property for the purpose of securing the payment of promissory notes amounting in the aggregate to the sum of \$30,000, and the trustees are made parties defendants. It also appears that Mrs. Kilbourn, in September, 1874, through her said husband as her agent, entered into a contract with the complainants to furnish a heating apparatus for their dwelling-house on the said premises for a consideration of \$2,500, to be paid in cash, and that the complainants completed their part of the contract about the 25th of February, 1875; that there has been paid complainants about \$500, leaving a balance still due of \$1,992.31. It was to secure this amount that they claim a lien against the dwelling-house and ground on which it stands.

The notice of claim for the lien, as far as it is necessary to be stated, is as follows: "*Thomas C. Basshor & Co. v. Hallet Kilbourn*," and recites that it is the intention of said company "to hold a lien upon the property of Hallet Kilbourn, being his dwelling-house situated at the intersection of K and Seventeenth streets, on lot — in square number 164, for the amount due," &c., &c., and is dated at the foot April 21, 1875.

The defendants Kilbourn and wife deny that the heating apparatus constitutes a part of the dwelling-house, or that it is an engine or machinery within the meaning of the statute. They also contend that the notice of an intention to hold a lien is insufficient.

The law relating to liens of mechanics and material-men provides that "any person who, by virtue of any contract with the owner of any building, or with the agent of such owner, performs any work upon or furnishes any materials, engine, or machinery for the construction or repair of such building, shall, upon filing the notice prescribed in the following section, have a lien upon such building and the lot

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of ground upon which the same is situated," &c., &c. (R. S., 83.)

The statute further provides that "any person wishing to avail himself of the provisions of this chapter * * * shall file in the office of the clerk of the Supreme Court of the District, at any time after the commencement of the building, and within three months after the completion of such building or repairs, a notice of his intention to hold a lien upon the property *declared by this chapter liable to such lien.*"

An agreed statement of facts was made and filed in the case supplemental to the pleadings, which contains the following matters and things:

"Said apparatus is constructed of iron and was manufactured by the complainants in Baltimore. As it stands now, and as it stood when the suit was brought, it rests flat upon the concrete floor of the cellar of the house, and is bricked up on three sides, the bricks resting upon the concrete floor of the cellar, and at the rear the bricks run up along and against the stone foundation wall of the cellar. The heating apparatus, as bricked up, is about six and a half or seven feet high, about six feet wide, and about seven feet from front to rear, and it reaches to within about three feet of the ceiling of the cellar. The house when built was provided with flues or conduits for the purpose of conducting and distributing heat through the house, and iron pipes run from the heater to connect with these flues or conduits. These pipes are about three inches in diameter, and run under and near the basement ceiling upon supports fastened with nails to the joists, and convey steam to the radiators which are fastened to the joists and which are inclosed in wooden boxes connected with wooden troughs, through which the air is brought from outside, the boxes themselves being also fastened with nails to the floor joists. The heat being abstracted from the steam by the cold air, the steam is condensed into water and flows back through the iron return pipes connected with the radiator to the boiler.

"This heating apparatus and pipes can be removed readily

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without injury to the building, and may be replaced by any other kind of heating apparatus with appropriate pipe."

It was agreed that the heating apparatus was put in after the house had been fully completed and was occupied by the defendant Kilbourn; and further, that the notice of the claim for lien was filed within three months after the work of putting in the apparatus had been completed.

The cause was heard at the special term upon the pleadings, exhibits, and on the agreed statement of facts, and a decree was passed directing a sale of the premises. From this decree an appeal is taken.

Walter S. Cox, for complainants.

Our act on the subject of mechanics' liens requires the party claiming a lien simply to file a notice of his intention to hold a lien on the property made liable by the law. It is admitted that the work was done in the dwelling-house occupied by the defendants at the intersection of K and Seventeenth streets, in square 164, and our notice refers to that property, and by law this property is made liable to the lien, and the law defines the extent of the lien. The notice, therefore, is sufficient to meet the requirements of the law.

Our act does not require the name of the owner to be given. It is, therefore, immaterial that our notice calls it the property of Hallet Kilbourn instead of his wife.

Nor is any accuracy in the description of the property necessary beyond what is necessary to identify it. For examples of descriptions which have been held sufficient, see Phillips on Liens, pp. 518-522, 529, and cases cited.

That the work was the proper subject of lien there can be no doubt.

The house was prepared in advance for this furnace. Some furnace was necessary for its convenient use, and this was embraced in the specifications of the complete house. It was a necessary part of the house, and belonged to its construction. It was solidly built up in and attached to the house. It can make no difference that it could be removed without

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injury to the house. The house would require something in its place. The same might be said of mantles, doors, and other fixtures.

For examples of work which has been held the proper subject of lien, see Phillips on Liens, pp. 224, 228, 230, and cases cited.

Enoch Totten, for defendant.

To bring themselves within the provisions of the statute, the plaintiffs must show that they either performed work upon or furnished "materials, engine, or machinery for the construction or repair of the building." It will hardly be contended that this heating apparatus is included in the terms "materials" or "engines." Is it embraced within the fair and reasonable import of the word machinery? Worcester defines the word machinery thus: "An artificial work which serves to apply or regulate moving power or to produce motion;" and the word machinery thus: "Mechanical combinations of parts for creating or for applying power in engines or machinery." The apparatus in question cannot be called machinery with any more propriety than can an ordinary stove. The lien law is a species of special legislation and against the policy of the public, and therefore will be strictly construed. All statutes of this character are odious, and confer unfair privileges and immunities on particular classes of creditors. There is no better reason for giving a material-man or mechanic a special lien for his property or labor put into the debtor's house, than exists for giving special protection to the grocer, tailor, or dry-goods merchant whose goods have been used for the subsistence or comfort of the debtor's family. One of the ablest jurists in this country uses the following strong language in reference to this kind of special legislation: "It is a species of class legislation in favor of landlords, granting them rights not given to other creditors generally. It follows that in availing himself of this special and extraordinary remedy, the landlord must take it just as the statute gives it to him." (*Merrit v. Fisher*, 19 Iowa, 354.)

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And the Court of Appeals of New York has announced substantially the same doctrine in a case where the lienor had failed to file an affidavit showing the institution of a suit for his materials within thirty days, as required by the statute. The court held that by this omission the lien was lost, and says: "The lien claimed by the plaintiffs is the creature of the statute, and depends solely for its validity upon the act creating it. The act is an innovation upon the common law, affecting property and rights of property. Authorizing as it does property to be incumbered without or against the consent of the owner, and without a resort to legal process or judicial action, such an act cannot be extended in its operation and effect beyond the fair and reasonable import of the words used, and the plaintiffs asserting the lien must bring themselves within its terms." (*Mushlitt v. Silverman*, 50 N. Y., 362; *Esterly's Appeal*, 54 Penn., 192.)

The bill avers that the furnace was "included in the specifications for the building" of the house. There is enough in the case to show that the house was new and but recently completed; it seems plain, therefore, that the furnace was not furnished "for repair" of the building. In order to entitle themselves to the benefits of the extraordinary remedy provided by the statute, the plaintiffs must show that their materials or appliances were furnished for either the construction or repair of the building. It is an admitted fact that in this case the house was fully completed and also occupied when the plaintiffs furnished their heater. It must from this fact follow that it was not furnished for the construction of the building, because how could anything be furnished for the construction of a building which was already fully completed? How could materials or machinery enter into the construction or form a part of a building already constructed?

The furnace is not a fixture. It no more forms a part of the building than does any ordinary stove with its funnel. Under a statute giving a lien for materials used for "erecting, altering, or repairing a building," it was held that a stove with its funnel was not comprehended within the law. (*Lom-*

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bard v. Pike, 3 Redington, Me., 141.) The heater in this case is no more than one large stove substituted and used in lieu of many smaller stoves. It is also an admitted fact, which greatly strengthens this view of the case, that the "heating apparatus and pipes can be removed readily without injury to the building, and may be replaced by any other kind of heating apparatus." It can be used in any other place with equal facility, and is not necessary or essential to the building, nor for its use as a dwelling-house. It therefore forms no part of the realty. The decided cases relating to the subject of "fixtures" are very conflicting, but I think the weight of authority is in favor of the doctrine as above stated. (See 2 Kent, 420 [343]; Amos on Fixtures, ch. 2, secs. 3, 4; *Gale v. Ward*, 14 Mass., 352; *Cresson v. Stout*, 17 John., 116; 28 Vt., 428; 1 Ohio, 511.)

Mr. Justice HUMPHREYS delivered the opinion of the court:

Under the statutes applicable to this District, complainants filed a bill to enforce a mechanic's lien.

Do the facts bring the case within the operation of the provisions of the statute as to liens?

Notice was given that a lien would be asserted for introducing into the basement of the house, which was the property of Mrs. Kilbourn, what is termed a heater. No specified lot or house was mentioned. It was only on K street.

We are unanimous that the description of the premises intended to be laid upon and covered by an asserted lien was not sufficient to give complainants the right of controlling a sale of the entire property; in fact, that no lien existed by reason of the statutory notice.

Some members of the court are of opinion that the nature of the complainant's claim is not such as will entitle him under the statute to attach the property.

But the first point is decisive of the question.

The decree is reversed and the bill dismissed.

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NANCY DUDLEY ET AL. v. WILLIAM BROWN.

AT LAW.—No. 15,086.

In an action of ejectment, the declarations of the defendant, made by him at a period after twenty years from the time he claimed to have taken adverse possession, are to be submitted to the jury in respect of the nature of such possession.

STATEMENT OF THE CASE.

This was an action of ejectment for the recovery of part of lot 1 in square 729, lying and being in the city of Washington and District of Columbia.

On the trial of the cause before the chief justice, the plaintiff gave in evidence a series of conveyances, which showed that one George Cole became seized of the premises in question on the 6th of July, 1829, and afterwards died leaving the plaintiffs his surviving heirs at law.

And thereupon the defendant gave evidence to the jury tending to show that his grandmother, one Sophia Jackson, was in possession of said real estate in 1819, living there as the head of the family; that she died about the year 1840, leaving her husband and unmarried daughter—the aunt of the defendant—in possession of the said real estate; that said daughter died about the year 1842, when the defendant entered into possession of the said real estate, and that he has since held uninterrupted possession thereof, claiming title in himself. And here the defendant rested.

And thereupon the plaintiffs gave evidence to the jury tending to show that the said George Cole, deceased, was the son-in-law of the said Sophia Jackson, the grandmother of the defendant; that prior to his departure for the Island of Hayti, after the year 1829, he attempted to sell the said real estate, failing in which, he left his wife's mother, the said Sophia Jackson, in possession thereof, with the expressed wish that she should hold the same during her life, and that at her death it should pass to his (said Cole's) sister.

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And the plaintiffs gave other evidence to the jury tending to prove that in the month of October, 1875, the said defendant declared and stated at different times, and to different persons, but particularly to two of the plaintiffs in this suit, that he was not the owner of the said real estate, but that the same belonged to the heirs of George Cole; that his aunt had, just prior to her death, placed him in possession of said real estate, with the request that he should preserve it for the heirs of the said George Cole, and that he was now willing to surrender the same to the said heirs upon their refunding to him the amount which he had expended on said property by way of taxes and improvements.

At the close of the testimony several instructions were asked, of which the following is the only one that was considered. It was a request of the counsel for the plaintiffs that the court instruct the jury as follows:

“The declarations of the defendant made at any time are admissible against him to show that he did not claim ownership in the property, and if the jury believe from the evidence that the defendant William Brown has declared, either to any of the plaintiffs or other persons, that the property in question belonged to the heirs of George Cole and not to him, and that he would return it to them upon his being repaid what he had spent upon the property, then and in that case the defendant's holding was not an adverse possession within the meaning of the law, and the plaintiffs are entitled to recover.”

But the justice presiding at the trial ruled as follows:

“I will give such instructions, subject to this limitation: that the jury must further find that the declaration was made within twenty (20) years after the defendant went into possession of the property, claiming title thereto.”

To which refusal of the court to give the instruction as asked, and to the giving of the instruction as limited, the counsel for plaintiffs duly excepted.

The verdict was in favor of the defendant, and the cause

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is now here upon a motion for a new trial in the first instance on a bill of exceptions.

Birney & Birney and *Edward A. Newman*, for plaintiffs.

Testimony as to the declarations of a defendant in ejectment may always be introduced to prove a tenancy under the plaintiff or his lessors; and such declarations are binding upon the defendant, unless he can show a paper title, which the law will not permit him to give away by parol. (*Davies v. Pierce*, 2 Term R., 63; *Jackson v. Dobson*, 3 Johns. R., 223; *Jackson v. Scissam*, 3 Id., 498; 6 Id., 21.) The defendant's declarations, and the other testimony offered by plaintiffs, show that the defendant entered upon this property as trustee for the heirs of George Cole. Where the entry is of such a character, the trustee is never permitted to set up a possession or title in himself adverse to the *cestui que trust*.

John H. Cook, for defendant.

The third instruction was properly refused. Wm. Brown's defense of adverse possession began in 1842; if proved to the satisfaction of the jury, would ripen into perfect title in 1862. The court was asked in the third instruction to say to the jury that alleged statements of the defendant, as to the ownership of said property, made in 1875, thirteen years after the expiration of the statutory period, would prevent the jury from finding—even if so proved—that the defendant, up to 1862, had held uninterrupted possession of said property for twenty years, claiming title in himself.

By the Court:

The ruling of the court below, that the declarations of the defendant were not to be considered, unless they were made within twenty years after he took possession of the premises in question, was a qualification of the instruction requested by plaintiffs' counsel which ought not to have been made. This view is now concurred in by the chief justice who tried the cause at the circuit. The statements of the defendant had been admitted in evidence, and ought to have been sub-

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mitted to the consideration of the jury. We do not say that the defendant was concluded by this testimony, for its reliability was a question for the jury. It went simply to explain defendant's possession. The proof that he confessed to the plaintiffs and others that he entered without title, and held possession only for the heirs of the owner of the legal title, would have a tendency to show that he had been holding all along as a tenant, and not adversely to the plaintiffs' rights. His admissions at any time to this effect were admissible as facts for the jury to decide. They might not have been sufficient to entitle the plaintiffs to a recovery; but as the jury was misdirected, the verdict must be set aside.

CHARLES T. DAVIS v. EDGAR SPEIDEN.**EQUITY.—No. 5323.**

- I. It is now settled in our practice that the pleadings, orders, and proceedings in a cause, as well as the final decree, constitute that portion of the record for the purpose of examining all errors of law in a bill of review.
- II. An order overruling a demurrer to a bill of complaint, and giving leave to the defendant to answer, is not appealable to the general term; but if, in such case, there is an appeal bond approved by one of the justices, it will operate as a stay of proceedings at the special term; and if any decree affecting the rights of the parties is taken at such special term during the appeal, it will be error in a bill of review.
- III. Unless the averments in a bill of complaint are precise and definite, no decree can be taken without proof, although a decree *pro confesso* has been previously obtained; and such error may be assigned in a bill of review.
- IV. A party must, in general, perform a decree before filing a bill of review. Where the decree is for the payment of money, he must either aver performance or set up his inability arising from insolvency.

STATEMENT OF THE CASE.

This is an appeal from a decree overruling a demurrer to a bill of review. The bill in the original cause was filed in

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April, 1876, by Edgar Speiden against Charles T. Davis, who is the complainant herein. It alleges that the said Speiden purchased from Davis, May 17, 1875, twenty thousand dollars of District of Columbia bonds, commonly known as 3.65 bonds of said District, for which he paid him \$1,100 in cash and gave his note for \$14,000, payable in thirty days, pledging said bonds as collateral security for the payment of the note; that on the 3d of July following Speiden made another purchase of 3.65 bonds for the sum of \$30,000, at the rate of 74½ per cent., for which he gave his note for \$21,000, payable in sixty days—the bonds being pledged as collateral security for the payment of said note also. He gave his personal note for \$1,425, payable at the same time. The notes were renewed at maturity, upon payment of the interest due thereon; in consideration of which Davis agreed to carry the bonds, and to hold them as collateral to the notes. Another renewal of the same kind was made in October, 1875, and finally, on the 7th day of December, 1875, the market value of the bonds having depreciated to 65 per cent., Speiden paid the interest due on the note and margin on the bonds, and gave Davis a new note for \$30,000, payable ninety days after date, with interest at 8 per cent., and a personal note for \$2,500, and Davis agreeing to carry the bonds as he had done before; that on March 14, 1876, Congress passed an act providing for the payment of the semi-annual interest on the 3.65 bonds, whereupon they appreciated from 74½ to 75 per cent., and Davis then claimed that he had sold the bonds at 66 per cent. on their face value; that although requested to render a statement of the said sale, Davis has never done so and retains the notes; and that he has brought suit against Speiden on the \$2,500 note, claiming a balance due thereon, on the law side of this court. The bill also alleges the belief of the complainant therein that Davis never had the bonds, and that he had perpetrated a fraud upon him.

The prayer is that Davis surrender the notes, and pay to Speiden the several sums of money which he has paid for in-

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terest and margins as aforesaid; that Davis may account for the market value of the bonds, and may be enjoined from prosecuting the suit at law.

Upon this bill an injunction issued according to the prayer thereof, and Davis having filed a demurrer, the same was overruled on the 8th September, 1876, with leave to answer the bill within ten days. An appeal from this order to the general term was perfected by filing an appeal bond on the 21st day of September, and on the 23d of the same month, notwithstanding such appeal, the complainant therein obtained a decree *pro confesso* for want of an answer, and on the 3d day of November following a final decree was entered at the special term upon the bill. There was no reference to an auditor and no proof. It was decreed that the suit at law be enjoined, and that Davis pay the said Speiden the sum of \$6,601, with interest until paid, and that he surrender the notes to be canceled—the amount decreed to be paid corresponding in the aggregate with the several payments alleged on the face of the bill to have been paid by the said Speiden for interest and margins, as already stated.

The general term decided, December 18, 1876, that an appeal would not lie from the order overruling the demurrer to the original bill, and the same was remanded to the special term for further proceedings.

Various other steps were taken in the cause, with a view to setting aside the decrees *pro confesso* and the final one, which having been denied, Davis filed the bill of review in this cause, setting out the whole record and appending a copy of his proposed answer to the bill in the original suit.

The errors of law assigned upon this record are:

1st. The special term had no jurisdiction to proceed with the cause pending the first appeal. 2d. The decree of November was unauthorized, without proofs. 3d. The cause having been remanded for further proceedings, the special term should have taken jurisdiction of the case as it was at

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the date of the appeal. 4th. The appellate court must determine its own jurisdiction, and pending such determination it is irregular for the special term to proceed with the cause, and such proceedings should be set aside on motion. Davis claims an irreparable injury by reason of the said erroneous proceedings, and that he is not indebted to the said Speiden in any sum whatever.

To this bill of review Speiden demurs, claiming (1) that there is no error of law on the record; (2) that Davis has not performed the decree sought to be reviewed; (3) the bill of review not filed in time; (4) too late to review a decree after an appeal from it to the general term and a dismissal of the appeal there.

After a hearing, the court in special term overruled the demurrer, sustained the prayer of the bill, set aside the decrees in original suit subsequent to appeal therefrom, and gave Davis leave to answer in said suit *instantly*.

From this decree Speiden appeals to this court.

R. K. Elliott and Edwards & Barnard, for complainants.

Whether the appellate court had jurisdiction or not, was for it alone to determine, and pending such determination the special term had no authority to proceed with the cause *ex parte*. (1 Md. Ch., dec. 330; 3 Id., 304; 6 Harr. & J., 328; 11 Gill. & J., 137; 34 Md., 236; *United States v. Pacheco*, 20 How., 263; *Green v. Winter*, 1 Johns. Chan., 77, 325.) The whole record was carried by the appeal to the general term, and it remained there, in contemplation of law, until December 18, 1876, when the appeal was dismissed and the cause remanded to the special term for further proceedings. (20 How., 263.) The demurrer to the bill in 1902 was not frivolous, nor the appeal merely for delay. The following authorities strongly indicate that the relief sought by the bill could have been obtained by way of set-off in the suit at law, or by declaration at law. (High on Injunct., sec. 46; Rev. Stat. D. C., 96, sec. 810; Rev. Stat. U. S., 137, sec. 723; Thomp. Dig., 198; 2 Black., 545; 3 Leigh, 667.)

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When a cause has not been heard on its merits, the court may vacate the enrollment, and give the party an opportunity of being heard upon the facts whenever such hearing has been prevented by mistake, surprise, accident, or misapprehension or negligence of the solicitor. (*Herbert v. Rowles*, 30 Md., 271; *Millsprugh v. McBride*, 7 Paige, 509; and cases cited in *Freeman on Judgments*, secs. 100, 580; 2 Dan. Ch. Pr., 1088.) The court would have as much power when set in motion by a bill of review as it would on motion or petition. It may treat the bill as a motion in 4902 for purposes of substantial justice. (6 How., 39.) A judgment irregularly entered will be vacated on motion or petition at any time, notwithstanding the term has passed. (*Stucker v. Cooper Co.*, 25 Mo., 401; *Freeman on Judgments*, sec. 97.) The answer of Davis discloses a meritorious defense to the suit on the facts, and a court of equity will not permit a denial of justice through any technical mistake or misapprehension as to the proper rule of practice. The decree should not have been entered under the averments and prayers of the bill, without a reference to ascertain the facts. The bill and affidavit would not have authorized a judgment at law without proof. (Equity rule 15.) The performance of the decree sought to be reviewed is not always necessary. The court having discretionary power in the premises, may dispense with its performance until after hearing on bill of review. (*Missie v. Graham*, 2 McLean, 41; 2 Dan'l Ch. Pr., 1643, n.)

William F. Mattingly, for defendant.

A bill of review may be brought in two cases: 1st. For error of law appearing in the body of the decree. 2d. Upon discovery of new matter. (Story Eq. Pl., 404; Mit. & Tyler Pl. Pr., 181; 2 Dan. Ch. Pr., 1631.)

If the decree is for the payment of money, it must be paid before the bill of review is filed, or, at least, secured to be paid. (Story Eq. Pl., sec. 406; Mit. & Tyler, 185; 2 Dan. Ch. Pr., 1631; *Wiser v. Blackley*, 2 Johns. Ch., 488.)

After the expiration of the term at which it was passed, a

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decree cannot be vacated, except by bill of review, for error apparent in the face of the decree, or upon discovery of new matter. (*Cameron v. McRoberts*, 3 Wh., 591; *Sibbold v. United States*, 12 Pet., 491; *Bank of U. S. v. Moss*, 6 How., 31; *Bank of U. S. v. White*, 8 Pet., 252; *McMicken v. Perin*, 18 How., 511; *Putnam v. Day*, 22 Wall., 60; *Roemer v. Simon*, 1 Otto, 149; *Jenkins v. Eldridge*, 1 Wood & Mi., 62.) An appeal even from an appealable order does not stay proceedings below. (*Riggs v. Murray*, 3 Johns. Ch.; *Ringgold's Case*, 1 Bland, 15.)

Mr. Justice MACARTHUR delivered the opinion of the court, in substance as follows:

In considering this cause, perhaps it will be as well to determine a point of practice in advance relating to bills of review, and that is as to what portion of the record we are at liberty to inspect for the purpose of discovering error in the decree sought to be modified or set aside by a bill of this nature. This practice has been regulated by the celebrated ordinance of Lord Bacon, according to which no bill of review can be entertained unless it shows error in law appearing in the body of the decree, without any other examination of fact or proceeding in the cause. This rule was adhered to with reference to the form of a decree at that time. An enrolled decree in the English chancery consisted of a parchment upon which all the pleadings were engrossed, and the exceptions and orders made thereon, together with a statement of the facts which the chancellor found to be established by the proof; and then followed the judgment of the court. The question of error in law could be determined upon the face of the decree without any further examination. With us the decree is usually confined to the judgment of the court; and, indeed, the rules of the Supreme Court of the United States forbid a recital of the pleadings or other proceedings in the cause in a final decree. If the rule of Lord Bacon, before cited, is to be applied to decrees thus general in form, it will be utterly impossible to sus-

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tain a bill of review for errors in point of law. This difficulty was early provided for by the Supreme Court itself. In *Whiting v. The Bank of U. S.*, 13 Pet., 6, the court say: "It has been suggested at the bar that no bill of review lies for errors of law, except where such errors are apparent on the face of the decree of the court. That is true in the sense in which the language is used in the English practice. In England, the decree always recites the substance of the bill and answer and pleading, and also the facts on which the court founds its decree; but in America the decree does not ordinarily recite either the bill or answer or pleadings, and generally not the facts on which the decree is founded. But with us the answer and other pleadings, together with the decree, constitute what is properly considered as the record; and therefore, in truth, the rule in each country is precisely the same in legal effect, although expressed in different language, namely, that the bill of review must be founded on some error apparent upon the bill, answer and other pleading, and decree; and that you are not at liberty to go into the evidence at large to establish an objection to the decree founded on the supposed mistake of the court in its own deductions from the evidence." The rule as thus explained is fully recognized in *Dexter v. Arnold*, 5 Mason, 311; *Putnam v. Day*, 22 Wall., 60; and *Buffington v. Harvey*, 5 Otto, 99. We may, therefore, consider it now settled that the pleadings, the proceedings, and the decree constitute a portion of the record for the purpose of examining all errors of law in a bill of review.

In pursuance of this rule we can look into the proceedings to see if there is any mistake in the decree. We find that there was a demurrer to the bill in the original suit, which was overruled at the special term, and the defendant had leave to answer the bill therein within ten days. From this order an appeal was taken to the general term, which appeal was dismissed for the reason that an appeal did not lie from an order overruling a demurrer to a bill and giving leave to

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answer. Much difficulty had been experienced by the court as to whether an order of this kind was appealable, and it was not until that term that it was expressly decided that an appeal would lie from such an order. In several instances of such appeals no question had been raised, and undoubtedly the decision of the court was unexpected by the counsel. However this may be, it cannot be doubted that as there was an appeal bond approved by one of the justices of the court, it operated as a stay of proceedings at the special term during the appeal. It appears from the proceedings that the decree of the 22d September, 1876, *pro confesso*, as well as the final decree on the 3d of November following, were both entered in the cause at the special term while the appeal was pending; for it was not until the 18th of December, 1876, that the latter was dismissed and the cause remanded for further proceedings.

In this we think there was manifest error. The proper practice on the part of the complainant in the original suit to pursue, under such circumstances, was to move for a dismissal of the appeal, and thus get rid of the impediment to his proceeding in the court below. The mere fact that the order turned out to be one from which no appeal in the opinion of the court would lie, did not authorize the complainant to disregard the supersedeas and take any order in the cause concluding the interests of the parties. For these reasons we think there was error on the face of the record.

But, passing over this objection, the inquiry occurs whether the complainant in the original suit was entitled to the final decree passed in the cause, without any proof, except such as might be inferred from the *pro confesso* which he had previously obtained. Speiden alleged in his bill that he purchased from Davis on two occasions 3.65 bonds of the District of Columbia, making an aggregate of \$50,000; that he made a small payment in cash and gave his notes for the balance, the bonds to be held by Davis as collateral security for the payment of the notes. Several renewals took place subsequently, interest was paid, and as the bonds depreciated mar-

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gins were provided for; and finally the amount was merged in two notes, one for \$30,000 and the other for \$2,500, the bonds all the time remaining as collateral security.

He also alleges that in consequence of an act of Congress making provision for the payment of the semi-annual interest of the bonds, the value appreciated to 74½ and 75 per cent., and that Davis sold the bonds for 66 per cent. at that time. He states various requests for a settlement without success, and expresses his belief that Davis never had the bonds, and was practicing a fraud upon him. He requests the notes to be surrendered, and an action at law commenced by Davis for a balance due him on one of the notes to be enjoined. The decree in his favor was for all the money he had paid Davis for interest and margins, and which he had specifically set up in the bill. Now, whether he was entitled to this amount depended upon whether Davis had sold the bonds, and when, and for how much. If Davis had sold the bonds for 66 per cent., as alleged in the bill, the proceeds would be insufficient to satisfy the notes, and hence no doubt Davis had commenced the action at law to recover the balance. We think, although there was a decree *pro confesso*, the averments of the bill were not of that precise and definite character as to dispense with some proof, or taking an account for the purpose of ascertaining more clearly the interests of the parties. We therefore come to the conclusion that in this respect there is also error in the decree.

But another rule of Lord Bacon, that has prevailed ever since, is, that a party must perform the decree before the bill of review can be filed. This rule has some exceptions, or, rather, the court will dispense with a strict compliance of the decree under special circumstances; such as the release of a mortgage, the surrender of a lease, or of a homestead, or place of business, where the party would be left in destitution, or where otherwise it is impossible for the party to perform it. But there is no discretion left in the court where the decree is for the payment of money, as in this case, unless the complainant sets up his utter inability arising from insolv-

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ency. No excuse of this kind is stated in the bill, and we would be disposed to sustain the demurrer, and dismiss the bill without prejudice to filing another, after the complainant had complied with the decree. But time for filing a bill of this kind has expired, and that course would deprive him of the benefit of the error in the decree. To obviate this result, and at the same time give the defendant the benefit of the rule, we will now give the complainant an opportunity to bring the amount into court *nunc pro tunc*. This will be a substantial compliance with the rule, without subjecting the complainant to the loss of his equitable remedies.

The decision of the court is that the decree appealed from overruling the demurrer to the bill of review will be affirmed, upon condition that complainant brings into court the amount of the decree in the original suit; otherwise the decree herein to be reversed and the bill dismissed.

MARY HARMON ET AL. v. JOSEPH T. DYER ET AL.

EQUITY.—No. 4490.

- I. A deed of conveyance from the devisee of a trustee in a trust deed will give color of title to the possession accompanying it, and a claim of title and possession under it will be evidence of an interest in the land described in the deed adverse to every other claim.
- II. A judgment in ejectment which was perpetually enjoined by a decree in equity for the reason that it was obtained fraudulently; does not interrupt the continuity of an adverse possession.
- III. Where there have been two actions in ejectment, one of which has been perpetually enjoined and the other discontinued, and where the defendants set up their title again in a cross-bill, a court of equity will entertain jurisdiction to quiet the title where the adverse possession has ripened into a full and perfect estate.

STATEMENT OF THE CASE.

The facts to be collected from the pleadings and proofs are substantially as follows: In September, 1835, one Dolla

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Mullen, the ancestor of the defendants, was seized in fee of a parcel of land in the District of Columbia, which need not be more fully described, and being indebted to Teresa Byrne and Bridget Rogers in the sum of \$108.75, which was to become due on September 30, 1837, she conveyed said real estate to Edward Dyer and *his heirs* in trust to secure the payment of said indebtedness in full. The deed contained the usual power to sell the property in case the said Dolla Mullen made default in paying off the debt. Under this trust the property seems to have been advertised for sale May 20, 1845, and Dolla Mullen paid to the agent of Teresa Byrne the sum of \$200 on this indebtedness; but it is clear from the receipt given on that occasion that the payment was on account, and that a balance remained due and unpaid. The sale did not take place. On the 7th of September, 1845, Edward Dyer died, having made his will, devising to his wife, Henrietta H. Dyer, all and singular the property and effects of which he died seized and possessed; and on May 18, 1848, the said Henrietta Dyer, by virtue of such will, and claiming to be the sole heir of her late husband, and believing herself authorized by the power contained in said trust, sold said parcel of land to Teresa Byrne for the balance of the indebtedness then due and unpaid. The said Teresa Byrne resold her interest in said sale to John L. Harmon, the father of these complainants, and on the 11th of August following the said Teresa Byrne and the said Henrietta Dyer united in the execution of a deed in fee of the premises to said John L. Harmon, he paying for said purchase the sum of \$350. It further appears that about this time Dolla Mullen vacated the premises, and the said Harmon took possession thereof, paid the taxes thereon, and claimed title thereto from the date of his deed to the time of his death, which took place on June 26, 1862, and that he died intestate, leaving the plaintiffs, his wife and four children, in quiet possession, who have also claimed title to the property ever since, for a period of about thirty years. Dolla Mullen remained in the neighbor-

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hood for over fifteen years after the sale without making any claim to the property.

In 1868 the heirs of Dolla Mullen commenced an action of ejectment in the old form of John Doe on the demises of the heirs of Dyer against John L. Harmon, whose death had taken place six years previously, and obtained judgment. Service was obtained on the complainant John O. Harmon, but before there was any execution of said judgment, the same was, by a decree in equity, perpetually enjoined on the ground of a want of service of process in an action against one dead. That injunction is still in force.

Afterwards, in 1871, these defendants instituted an action of ejectment against these complainants to recover the said property, and, upon trial, a verdict and judgment were given in favor of these complainants, from which the defendants appealed; when said judgment was set aside on grounds different from that of complainants' principal grounds of defense—adverse possession. That these defendants refused to retry the said suit, and two years afterwards voluntarily dismissed the same; since which time they have made no judicial assertion of their claim until that made in the cross-bill of the present case.

As already intimated, the Mullen heirs, who are defendants, have filed a cross-bill, which alleges that the debt was paid; that the recovery in the first ejectment suit was good as to one undivided fourth part of the estate; that this recovery broke the continuity of adverse possession; charges that said conveyances stated could only operate to pass naked legal title for use of Dolla Mullen; relates the original bill, and prays, *inter alia*, for an account of one-fourth of the rents, and for general relief.

The answer of the Harmonsons denies the payment of the whole debt on May 20, 1845; avers that after John L. Harmon was long dead a summons was presented to John O. Harmon, son of the late John L., who was requested to sign his name on the back of it, which he did, and subsequently

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employed counsel and defended the cause; claims a valid title and the benefit of limitation.

The decree, May 25, grants the injunction prayed and dismisses cross-bill.

The case is here on appeal from this decree.

A. G. Riddle and *J. E. Padgett*, for complainants.

Harmon went into possession in good faith, and in the belief that he had a valid title to the property. There is no evidence that Dolla Mullen ever asserted an adverse claim to the premises to Mr. Harmon, but from her subsequent actions the law presumes the contrary.

Harmon made repairs, paid the purchase-money and taxes, and if Dolla Mullen had any title to the premises she should have asserted it at the time of the sale, and not permitted the purchaser to expend money thereon in the belief that he was the true owner; and the law will not allow her heirs after the lapse of twenty-nine years to impeach the title of the purchaser and set up said adverse claim. (Story's Eq. Jur., secs. 385, 388; *Storrs v. Barker*, 6 Johns. Ch., 166; *Wendell v. Van Renselaer*, 1 Johns. Ch., 354.)

Dolla Mullen, during subsequent life, and her heirs, since her death, have been guilty of such laches as preclude them from any relief in this court. (Story's Eq. Jur., sec. 1520, note 3.)

Harmon entered into possession of the premises under color or claim of title, and he and his heirs have continued in the adverse and open possession of the same ever since. If a person claims title under a void and worthless deed, it is sufficient to support an adverse possession. (Tyler on Eject., 861, *et seq.*; *Wright v. Mattison*, 18 How., 56; *Pillow v. Roberts*, 13 How., 477.)

Where a person enters into the possession of real estate under color or claim of title, and continues in the adverse, open, and notorious possession of the same for twenty years, he thereby acquires a legal title to the estate, and may plead it in bar of an ejectment. And this adverse possession not

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only bars the remedy, but extinguishes the right of those claiming title to the property, and vests a perfect title in the adverse holder. (*Leffingwell v. Warren*, 2 Black R., 605; Tyler on Eject., 861, *et seq.*)

This court has jurisdiction of the bill in the present cause, and may grant the relief asked. Separate attempts have been unsuccessfully made to overthrow the rights of the complainants, and justice requires that they should be quieted in these rights. They are clearly entitled to the redress prayed for, and another trial at law is not necessary. The granting of the writ of injunction rests in the sound discretion of the court, and it will be granted to quiet title where the right has been established at law; and where the right is plain, and the remedy at law is not adequate, it will oftentimes be granted without even a trial at law. (*Outting v. Gilbert*, 5 Bl. C. C., 263; *Alexander v. Pendleton*, 8 Cranch, 462; *Nichols v. Trustees of Huntington*, 1 John. Ch., 176; 3 John., 604; Story's Eq. Jur., sec. 858.)

Perpetual injunction to quiet title will lie, when the party having possession is disturbed, but not so dispossessed as to make it the subject of an action at law. (*Trustees of Louisville v. Grey*, 1 Litt., 148; *Armitage v. Wickliff*, 12 B. Monroe, 494.)

When Dolla Mullen executed the deed of trust she conveyed all her legal estate to Edward Dyer and heirs, and retained only the equity of redemption. Neither she nor her heirs are entitled to any redress in a court of law, and this is the only court that has jurisdiction in the premises. (Tyler on Eject., pp. 62, 74, 75, 773, and cases cited.)

Th. Jessup Miller, for defendants.

On August 11, 1848, Henrietta Dyer, the widow, having no estate therein, purporting to be sole heir of Edward Dyer by virtue of said will, and pretending to be trustee by virtue of said deed of trust, for \$1 to herself and \$849 to Teresa Byrne, pretended to convey the parcel of land to John L. Harmon. As this deed recited the deed of trust and the will, and refers

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to them as the source whence the grantor derived authority to convey, they are to be construed as if incorporated in it. (*Van Renselaer v. Kearney*, 11 H., 328.) It is apparent, then, from the face of the deed, that no estate did or could pass thereby. If anything passed, it was the naked legal title for the use of Dolla Mullen and her heirs.

Thereafter, J. L. Harmon certainly *wrongfully and tortiously*, and, as appears probable from the evidence, also *forcibly*, obtained possession of the land, and thence kept possession thereof peaceably until his death in 1862, and his widow and children continued such peaceable possession until May 14, 1868, *less than twenty years*, when John Doe, on demises from the heirs of Edward Dyer and from heirs of Dolla Mullen, brought suit in ejectment for the land against Richard Roe, who gave notice to John Harmon, under the name of John L. Harmon, who, as he learned, was in possession of the premises, to defend the suit. The plaintiff in this cause, John O. Harmon, received copy of the declaration May 16, 1868, and appeared in the cause, and with the other heirs of his father employed counsel and defended the cause, and judgment was rendered for the plaintiff.

The recovery in this cause was good. It is no objection to it that the occupants—complainants here—were not served with any writ or process. They had notice of the suit and they defended it. The judgment, therefore, in this cause was as effectual as a judgment in the old form of ejectment with its fictions could be, not as concluding any person or party, but as putting the plaintiffs in possession. (See *Evans Pr.*, 202; *Cox Com. Law Pr.*, 193; *Gray v. Patton*, 2 B. Mon., 12; *Fairclaim v. Shamtitle*, 2 Burrows, 1292.)

The recovery as against John O. Harmon, a complainant here, was unquestionably complete. He, by the name of John Harmon, (which name he often used,) appeared, pleaded claiming title, and suffered judgment. "The law knows but one christian name, and the insertion or omission of a middle name or initial letter is not material." (*Gaines v. Stiles*, 14 Pet., 322.)

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April 29, 1870, the complainants here filed their bill against the heirs of Dyer and the marshal of the District to enjoin the execution of a writ of *habere facias possessionem* issued on said judgment, on the ground substantially that there was no defendant to said suit; the prayer of this bill was granted by default.

The proceedings in this cause were *coram non judice*, and therefore utterly null and void.

The proceedings in this cause had no effect upon the judgment in the ejectment suit. The judgment ousted the plaintiffs here and interrupted the *adverse possession*, and stands affirmed by the court in general term.

These proceedings cannot be held to have any effect whatever upon the rights of the heirs of Mullen, not made parties, to have their execution on the judgment.

The bill in the present cause must fail for want of jurisdiction in this court as a bill of peace, because that is "filed for securing an established legal title against the vexatious recurrence of litigation, whether by a numerous class insisting on the same right, or by an individual reiterating an *unsuccessful* claim. The equity is, that if the right be established at law, it is entitled to adequate protection." (Adams Eq., 199-202; *Black v. Shreve*, 3 Halst. Ch., 440; *Bond v. Little*, 10 Geo., 395.)

"In order to the maintenance of a bill of peace, the complainant must have first established his title at law." (*Eldridge v. Hill*, 2 Johns. Ch., 281; 2 Story Eq., sec. 859; *Morgan v. Smith*, 11 Ill., 194; *Green v. Harrison*, 7 Ala., 585; *Low v. Lowry*, 4 Hammond, 78; *Harman v. Gwynne*, 5 McLean, 313; *Paterson v. R. R. Co.*, 1 Stockt., 434.)

A bill for injunction will no lie, because the record shows that the complainants are in possession of the property as wrong-doers and are entitled to no equity. They are without any sort of privity with the title to any estate in the premises. The adverse possession attempted to be set up, and held by the chancellor to be a sufficient title, can only begin to run

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from the time of the recovery in the ejectment suit in 1870—not sufficient to give any title.

CARTTER, Ch. J., delivered the opinion of the court:

After stating the facts, he proceeded to say, in substance, that it cannot be disguised as a fact established by the proofs in this case, that Dolla Mullen knew when the property in question was transferred by a conveyance to John L. Harmon; and that with full information on this subject, she at least, by her silence, acquiesced in his possession, accompanied with a claim of title for a period, a little indefinite to be sure, but certainly for sixteen or seventeen years. She did not die until immediately before the commencement of the war. She appears to have gone out of possession and Harmon to have gone in about the same time; so that she, at all events, seemed to believe that Harmon was entitled to the premises. It was not until four days before the expiration of twenty years from the time of Harmon's purchase that the first action in ejectment was commenced by her heirs. Now, admitting that it was not in the power of Dyer to create by his will a title in his devisee, still the conveyance of his wife to Harmon could perform the office of giving color of title to the possession that accompanied it. We think it did this effectually, and it is properly to be considered in evidence here of an interest in the land adverse to every other claim.

On May 16, 1863, the ejectment was commenced, and if the recovery in that action had remained unimpeached, its effect would have been to destroy the adverse character of possession by the Harmons. But the execution of that judgment was enjoined perpetually by a decree in equity. We think the decree was as broad as the judgment and neutralized its effect. The bill in equity alleged that the judgment was fraudulent and void as against the heirs of Harmon, for the reason that the suit was commenced against a man who had been six years in his grave, and the service of process therein had been imposed upon a man not a party to the suit, under the representation that if he did not acknowledge a service

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made upon him, judgment would go by default, and other serious consequences would follow. The charge that the judgment was fraudulent appears to have been sustained by the court, and a perpetual injunction was decreed. This, we think, is the end of that matter, and the parties were left to enjoy their rights as if there had been no such recovery.

Matters remained in this condition until 1871, when defendants for the second time instituted another action of ejectment to recover the property, and these complainants succeeded in establishing a defense under the statute of limitations. The judgment upon an appeal was set aside, but on grounds which did not reach the merits of this defense. The cause went back to the Circuit Court, and the Mullens discontinued their action, leaving the complainant in a possession that had ripened into complete and perfect title.

The defendants, for the third time, have claimed title in their cross-bill, and the complainants ask to have the controversy settled, so that they may enjoy the quiet possession of the property thus acquired, released of this clamor against their title. They represent that this is necessary in order to enable them to partition, or to sell the land for its true and adequate value. The court below came to the conclusion that complainants' title had been sufficiently established to justify a decree for that purpose, and after a thorough presentation of the case by counsel we have come to the same conclusion. Harmon entered into possession by virtue of a conveyance not strictly in accordance with law, but he honestly paid the consideration which satisfied the outstanding trust deed, and for a period considerably over twenty years he claimed title during his life-time, and his heirs after him. There have been two ejectment suits; the cloud of this controversy still hangs over the estate, and we think it ought now to be put to rest. We therefore order that the decree below be affirmed.

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CHARLES A. ELDRIDGE v. THE CONNECTICUT GENERAL LIFE INSURANCE COMPANY.

EQUITY.—No. 4561.

- I. A trustee cannot, by his arbitrary act, divest the *cestui que trust* of legal or equitable rights, where the case presents badges of fraud or unfair dealing.
- II. Where an insurance company in another State employs an agent here to invest moneys on real-estate securities, it was held that such company was chargeable with any notice or knowledge acquired by such agent in regard to existing equities on the property; and this rule was applied where the same person was the common agent of the borrower and lender.
- III. A party obtaining a trust deed with notice, either to himself or his agent, of the fraudulent discharge of a prior incumbrance, is not a *bona-fide* purchaser; and a court of equity will set aside such fraudulent release and give the party injured the benefit of his security.
- IV. Where a purchaser employs the trustee in a prior trust deed to examine the title, such trustee, in respect of that matter, is the agent of the purchaser, and notice acquired by him, in the course of such employment, is notice to the purchaser.

STATEMENT OF THE CASE.

On the 17th day of August, 1871, Henry H. Dudley, being seized of lots 1, 2, 3, 4, and 20 in square 204, gave two notes of \$3,500 each, payable in one and two years respectively, with interest at 7 per cent., secured by deed of trust, to one Joseph Blackfan. It was recorded on the following day, and in the record the name of the grantee was erroneously written "Blackford" instead of "Blackfan." On the production of the original deed subsequently, the deputy recorder entered a correction upon the margin.

On November 10, 1871, Dudley having sold and conveyed to John Van Riswick, the latter conveyed the same to George B. Coburn for \$7,734.40, for which Coburn made his three promissory notes to Van Riswick for \$2,578.13 each, payable in one, two, and three years respectively, with 7 per cent. interest, secured by a deed of trust to William H. Ward.

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On June 15, 1872, the firm of Aistrop & Dudley borrowed from the complainant \$4,000, for which they gave their note at sixty days. As collateral to this note, Aistrop & Dudley procured Van Riswick to endorse two of the notes made by Coburn to complainant without recourse.

On February 18, 1872, and subsequent to both of said deeds of trust above mentioned, Coburn conveyed to the defendant Edwin E. Mayhew, subject to these incumbrances. Mayhew made a new subdivision of the lots. On September 25, 1872, the first one of the two notes became due, secured by trust to Blackfan, and was paid, leaving one for \$3,500 to be afterwards paid, and Blackfan thereupon released several of the lots from the operation of that deed. The other note became the property of the Arlington Fire Insurance Company, which not being paid at maturity, the lots still covered by the deed were sold, and the fire insurance company became the purchaser. The second trust was a subsisting lien upon the remaining lots which had formally been released, as already stated, upon the payment of the first of these two notes. No further account of that trust is necessary to understand the decision.

In September, 1872, Mayhew effected a loan from the Connecticut General Life Insurance Company. In this transaction one J. G. Bigelow acted under instructions both from Mayhew, who was the borrower, and the insurance company, who was the lender. The court, as will be seen from the opinion, came to the conclusion of fact, from the proofs and exhibits, that Bigelow was agent for the company as well as for Mayhew, and that notice to him was notice to them. The testimony on this branch of the case is too lengthy for recital in this statement, and is sufficiently referred to in the opinion.

On September 25, 1872, the defendant Ward released the trust deed executed by Coburn, without the knowledge or consent of complainant, in order to give the company a first lien to secure the large loan which they were making to Mayhew, the amount of the loan being about the sum of \$32,000.

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- The fact that the two notes held as collateral by complainant were not in possession of Van Riswick, the payee, was known to Bigelow. These notes were not paid, and were not produced at the time the trust was discharged. The defendant Dudley represented that he owned them, and assumed that he could control them, and by these representations Ward was induced to sign, acknowledge, and deliver the release complained of. From the evidence in the case, the court came to the conclusion of fact that Bigelow had notice that Dudley had transferred his interest in the notes, or at least had sufficient notice to put him on inquiry. Coburn, Aistrop, and Dudley are insolvent. The cause was heard at the special term, and a decree was passed setting aside the release and directing a sale of the lots. From this decree the Connecticut General Life Insurance Company appealed.

Enoch Totten, for complainant.

There is a most extraordinary similarity between this case and the case of *Burnstine v. Ormes*, 2 MacArthur, 219. The fraudulent release in each case was made and delivered by this same trustee and to the same insurance company. In the present case Ward made the deed on the 25th day of September, 1872, and in that case, only about four months afterwards, on the 4th day of February, 1873. Bigelow was the agent of the insurance company in both transactions, and received the fraudulent deed in each case and sent it to the company. The cases differ in this: that Ormes falsely represented himself in that case as the holder of the note, and in this case Dudley acted that part. In that case Ward was passive, while in this he was active. He was active not only in the capacity of trustee, but also in the other capacity of attorney for the insurance company. In both cases the innocent victim was reposing in fancied security, without notice or any ground of suspicion of the fraud these men were engaged in perpetrating upon his rights. The court in that case used language which is strangely appropriate here. The opinion says:

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"In this case the negotiable note which was secured by the first deed of trust was made by John N. Hubbard to James M. Ormes, and the latter endorsed it to the complainant Burnstine, who became the purchaser for full value. While the latter was relying upon this security, the trustee, William H. Ward, was induced by a fraudulent imposition and representation to execute a release of the deed of trust without any notice to Burnstine, and without his consent or knowledge. After the property had been released, the insurance company advanced money, upon the loan already negotiated, to Hubbard, and claims it has obtained a priority of lien by virtue of the second trust deed which had been executed to the company, and that consequently Burnstine loses his security. We are, however, satisfied from the testimony that Bigelow, who was the agent of the insurance company, was an active party to the fraud in obtaining the release, and that Ormes acted in concert with him.

"It is also clear that they both knew perfectly well that Burnstine held the note, and relied upon the property as security for its payment. The company, we think, are not justly entitled to the advantage which they claim, when it has been acquired by the active fraud or imposition of one of their own agents. As Burnstine was an innocent party without notice, or any circumstance that could excite his suspicion, we think he ought to be maintained in his right, even if the loss falls upon the appellant."

Ward, in his answer, denies that he accepted the trust conferred to him by the deed in question, but admits that he executed and delivered the fraudulent release. This act precludes him from denying that he accepted the trust. It is not necessary that a trustee should signify his acceptance of the trust in a formal manner. Acceptance or assent may be by words or acts. (*Scull v. Reeves*, 12 Green Ch., 84; *Leffler v. Armstrong*, 4 Iowa, 482; *Skipworth v. Cunningham*, 8 Leigh, 271; *Spencer v. Ford*, 1 Rob., (Va.) 648; *Pope v. Branden*, 2 Stew., (Ala.) 401; *Hipp v. Hutchett*, 4 Tex., 20; *Flint v. Clinton Co.*, 12 N. H., 432; *Hill on Trusts*, 214.) The

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duty of making a release at the proper time was one of the trusts mentioned in the deed. Bigelow was the general agent of the company, as well as its special agent, in this particular transaction, and Ward was also the attorney employed by the company to make the examination of the land records relating to this particular property. Bigelow's relations to the company during the transactions in this case were precisely the same as they were when the Burnstine trust was fraudulently released. Bigelow knew perfectly well that Dudley and Aistrop did not hold the notes at the time they undertook to discharge the plaintiff's security. Dudley told him so. But Bigelow says it was exclusively Ward's business to look after the title. Ward had the trust deed before him, and saw that the deed was made originally for the benefit of Van Riswick, who in writing, and on the release itself, disclaimed ownership except as to the first note, and that was paid. Dudley, who signed the firm-name of Aistrop & Dudley to the release, did not produce for Ward's inspection and cancellation the notes they claimed to own, nor did Ward call upon him to do so, as he should have done. The plan was to get this release at all hazards. Ward having been employed by the company to examine the records, and having done so, it will be presumed, even in the absence of all proof, that he saw this deed of trust and knew its contents, and also that he knew that Aistrop & Dudley were strangers to it. (*Hodson v. Dean*, 2 S. & S., 221; 2 Lead. Cas. in Eq., pt. 1, p. 144.) He undertook to discharge this trust, and of course knew all about it. He was acting as the attorney of the company at the time, and the company is therefore chargeable with notice of the contents of the deed, as well as of the very suspicious circumstances connected with the release.

The deed of trust showed upon its face that it was made for the security of notes running to Van Riswick, and Van Riswick appeared before Ward with only one of the notes, the other two remaining unaccounted for. In addition to

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this, Bigelow had positive proof that Aistrop & Dudley did not own or hold them. Of all these things the company must be held to have had actual notice through its agents and representatives. (2 Lead. Cas. in Eq., pt. 1, pp. 134, 144, 154, 157, 160, 178; *Williamson v. Brown*, 15 N. Y., 359; *Chumplin v. Loytin*, 6 Paige, 189, 203; *Burnstine v. Ormes*, 2 MacArthur, 219.)

A mortgagee with notice of the fraudulent discharge of a prior mortgage, is not a *bona-fide* purchaser. (*Morgan v. Chamberlain*, 26 Barb., 163; *Ely v. Scofield*, 35 Barb., 330; *Jackson v. Post*, 15 Wend., 594.)

The English and the American courts now apply the same rules in regard to notices under the registry acts as to all others. Notice, even under the registry acts, which puts the party upon inquiry, is sufficient. (*Williamson v. Brown*, 15 N. Y., 358; *Norton v. Eaton*, 91 U. S., 720.)

In the case of *Williamson v. Brown*, Judge Selden uses the following language: "When the purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona-fide* purchaser." The rule being, that the party in possession of certain information will be chargeable with all the facts which, on inquiry suggested by such information, prosecuted with due diligence, would have disclosed.

The release in this case having been wrongfully made, and the company being chargeable with notice of the fraud, through both its attorney in fact and its agent, the release was properly set aside and decreed to be null. (*Gordon v. Mulhare*, 13 Wis., 22; *Burnstine v. Ormes*, 2 MacArthur, 219; *Williamson v. Brown*, 15 N. Y., 359.)

The defendants Aistrop, Dudley, and Coburn are insolvent, and therefore the plaintiff is without remedy on the promissory notes.

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Walter Davidge and *S. R. Bond*, for the insurance company.

There can be no question that unless the company stands charged with notice, its legal title must prevail, even though the release was improperly or fraudulently made.

A *bona-fide* purchaser is not affected by any latent equity founded on a trust deed, or otherwise, of which he had not notice. (*Scott v. Burton*, 2 Ashm., (Pa.), 312; *Valle's Administratrix v. Am. Iron Mountain Co.*, 27 Mo., 455; *Ely v. Schofield*, 35 Barb., 330; *Executors of Swartz v. Leist*, 13 Ohio St. R., 419; *Waters v. Waters and Jones*, 20 Iowa, 363.)

The deed of trust is used by us instead of a mortgage as security for the payment of money; and to hold that a purchaser may not rely upon the act of the trustee in giving a release, but must investigate the particulars of each transaction to see if the trustee has acted properly, would introduce an element of uncertainty into our records, and render dealings in real estate among the most doubtful instead of the most stable and reliable of human transactions. In the case of *Savage v. Gregory*, 32 Conn., 250, a bill was brought to foreclose a mortgage by the assignee of the note secured. The mortgagee, after assigning the note, had received the legal title and conveyed it away. The court held that the purchaser took it discharged of the mortgage, and, referring to the equitable maxim that where there is equal equity the law will prevail, say: "This maxim is, in cases of this sort, entitled to peculiar force with us under a recording system founded upon the policy of having the true state of every title to real estate appear upon our records." * * * "It is a familiar law, that a sale of real estate by a trustee to a *bona-fide* purchaser who has no notice of the trust, if made for a valuable consideration, will be good against the rights of the *cestui que trust*." And in *North v. Belden*, 13 Conn., 380, the court say: "This policy has added greatly to the security of our land titles, and has prevented much litigation which would otherwise have arisen; and our courts have ever considered it their duty to give such a construction to our statutes as will continue this salutary protection."

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Mr. Justice MACARTHUR delivered the opinion of the court, in substance as follows:

The question principally discussed at the hearing, was whether the insurance company was a *bona-fide* purchaser for a valuable consideration, and without notice of the complainant's existing equities. The notice which is imputed to the company is not actual knowledge that the property in dispute was in fact incumbered by a previous equity in favor of complainant, but a notice with which they are to be charged, growing out of the fact and circumstances of the transaction, within the knowledge of their alleged agent, in procuring the fraudulent discharge of the trust deed by Mr. Ward. This can only be determined upon the facts of the case. For this purpose we need not consider any of the circumstances in proof, except those involved upon this point of the controversy.

Henry H. Dudley was seized originally of all this estate, and executed thereon a deed of trust to one Joseph H. Blackfan to secure two notes of \$3,500 each. One of these notes was paid, and the other became the property of the Arlington Fire Insurance Company; and the evidence relating to all this will not be further noticed, as they are not facts essential for our consideration.

Dudley conveyed his equity of redemption to John Van Riswick, who on the 10th of November, 1871, conveyed to George B. Coburn for \$7,734.40, for which Coburn made his three promissory notes to Van Riswick for \$2,578.13 each, payable in one, two, and three years respectively, with seven per cent. interest, secured by a deed of trust to William H. Ward.

On June 15, 1872, the firm of Aistrop & Dudley borrowed \$4,000 from the complainant, and made their note to him therefor, payable in sixty days, and as collateral security they procured Van Riswick to endorse two of the three Coburn notes to Eldridge, without recourse. Coburn meanwhile had conveyed the property to one Edwin E. Mayhew, who subdivided it into lots from 50 to 65.

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At the time Mayhew obtained a loan from the Connecticut General Life Insurance Company, the Coburn deed of trust to Ward was a subsisting incumbrance, and the complainant held two of the three notes secured by it as collateral to the note of Aistrop & Dudley for \$4,000, no part of which has ever been paid. The trustee therein executed a release of the same, without the knowledge and consent of complainant, in order that the company might have a prior lien as security for the loan which they had negotiated to Mayhew. The complainant files this bill for the purpose of vacating this release, and the controversy between him and the insurance company is as to which of them shall sustain the loss arising from this fraudulent discharge. Whether the insurance company is to be considered a *bona-fide* purchaser, depends upon the question of notice, either to the company or its agent, of complainant's interest. If the company is to be charged with such notice, the prayer of the bill must be granted, according to well settled principles of courts of equity. This is not a case of actual notice. It is a case of notice to an agent, which, however, if it exist, is equally fatal to the rights of the insurance company as a subsequent purchaser. Our opinion assumes that the proofs establish the fact that Bigelow, who conducted the loan, was the agent of the company, and they are affected as principal by his knowledge. It frequently happens that in purchases of real estate, and in negotiations for investing money in real-estate securities, the same agent acts for both parties; and it is uniformly held that both parties shall be intended to know whatever is in the knowledge of the agent thus mutually intrusted by them, and each principal is affected with notice as much as if different agents had been employed. (*Dryden v. Frost*, 3 Myl. & Cr., 670; *Dunlap's Paley's Agency*, 263, note *f*.) The company advanced the money which constituted the loan to Mayhew, the borrower. The company relied upon Bigelow to transact the business in their interest, to see to the proper mode of investment, to employ a competent person to examine the title, to have the prior incumbrance paid off, and to effect a large amount of life insurance

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as part of the consideration. In a word, he was the common agent of the borrower and lender; and any notice to him operated constructively as a notice to his employers. The attempt which was made in the testimony to separate his acts into those which he performed for each of the principals in the same transaction, was entirely unsatisfactory; and the effort to make this distinction has only served to show that there is no ground for it in this or any similar case. The only practical rule to apply in such transactions, is that when the same agent is employed by both parties they are equally bound by his acts, and by any knowledge he may have acquired in regard to the rights of other persons. The conclusion, I think, is inevitable from the circumstances of the transaction we are investigating, that Bigelow is properly considered as the agent of the company as well as of Mayhew.

It is a rule in equity that a principal is affected by any notice communicated to the agent, or by any knowledge which he has acquired in reference to the business of the agency. It would be useless to cite authorities to a doctrine so familiar. And it is equally true that whatever is sufficient to put a party upon inquiry, is held in equity to be good notice to bind him. (1 Story Eq. Jur., sec. 399.) Now, according to this principle the knowledge of Bigelow, or any notice to him, must be imputed to the company, and is as binding upon them as if they actually knew of the fact. Notice to an agent in making a purchase of real estate affects his employer. (*Norris v. Lee*, 8 Atk., 23.) The trust deed to William H. Ward was of record, and it disclosed the interest of the *cestui que trust*. It was, moreover, a naked trust, giving no discretion to the trustee other than to execute the powers therein specified; one of these being the authority to release it upon payment of the indebtedness thereby secured. In this particular he was clothed with no discretion, his only duty and power being to execute a discharge when the notes were paid. It is also a rule in equity that notice of a deed is notice of its contents, and notice to an agent is notice to his principal; (4 Kent Comm., 179;) and in this particular case it seems quite im-

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material whether the company is chargeable directly, or through their agent Bigelow, who acted for them in this transaction, with having a knowledge of this instrument; in either case they cannot hold against the prior equitable title of the complainant. They were equally bound to know the fact that Ward was not authorized to discharge the incumbrance unless upon payment of the debt. The facts upon this branch of the case are not the subject of much doubt or dispute. We have seen that the two notes held by the complainant as collateral had been transferred to him by John Van Riswick at the request of Dudley & Aistrop, he retaining the one first falling due. At the time the release was executed, Van Riswick attended before the trustee as holder of that note, and Dudley & Aistrop, or one of them, were present, claiming to be the owners of the other two notes. These were not only not paid—they were not even produced. It appears that Dudley had previously informed Bigelow that his firm owned these two notes, that they were in possession of another party, but that they could control them, and gave him to understand that the person holding them had some claim upon the notes, but that they would satisfy it, and concluded by remarking: "I will make it all right with Ward, the trustee." Bigelow then testifies: "It was that remark that led me to suspect that the party who had the notes might have some claim upon them." The communication of these circumstances to Bigelow, by the very person with whom he was contracting, was full of suggestion. The notes were not then due; they were outstanding in the hands of another person. It is not merely presumed that Bigelow had this information; the facts were communicated to him in person by a party who claimed to own the notes, and who declared he could make it all right with the trustee. There was not only strong ground for suspicion, but the witness testifies to his impression that the holder of the notes had an interest in them of some kind. No mind under the same circumstances could help coming to the same conclusion. He had clearly sufficient information to put him upon inquiry and the exercise of diligence; he was bound to inform

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himself. "The general doctrine is, that whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, as in the case of *purchasers and creditors*, and would lead to a knowledge of the requisite fact by the exercise of ordinary diligence and understanding." (4 Kent Comm., 179.) This doctrine is quite applicable to the circumstances of this case. Bigelow acknowledges that his suspicions were excited, and we cannot fail to see that the exercise of ordinary diligence would have put him in full possession of knowledge concerning the equities of prior parties. He avoided this knowledge by abstaining from all inquiry, and through his negligence, to say the least of it, this iniquitous fraud was perpetrated. He never saw the notes, he knew they were not paid, and could not be paid till they were due, without the consent of the party holding them. Under these circumstances he is not only to be charged with a knowledge of all the facts he might have ascertained by inquiry, but the company is to be credited in the same way and to the same extent. The equities between the two litigating parties to this controversy are quite similar. The defendant advanced a large sum of money without actual knowledge of the fraud and circumvention by which a trust deed had been discharged, and the complainant was entirely ignorant of the whole transaction until long after it was consummated. The claims of both to the equitable consideration of the court are almost equally strong. They appear to be innocent of actual fraud; but, upon the principles just explained, I concur in the judgment which reinstates the rights of the complainant, and to that extent postpones those of the defendant.

The same observations are applicable in great measure to another feature of this case. A primary object of the insurance company was to obtain, if possible, a first incumbrance upon the property in view of the large amount of the loan. Bigelow was therefore instructed to look well to the state of the property and the discharge of existing liens, and for this purpose to employ a competent person to examine the title. He employed Mr. Ward, who was the trustee in the trust deed

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from Coburn, and for this service Ward received \$100 paid out of the loan.

His employment to abstract the title of this property was entirely independent from the duties devolving upon him as trustee, and in that matter he is exclusively to be regarded as the agent of the company. We have seen how limited were the powers conferred upon Ward by the trust deed, and that the release he made was in no just sense an execution of these powers. Ward, of course, must be intended by law to have known the contents of that deed, and the restricted powers it conferred upon him, and yet, after having discharged the security at the request and upon the statements of entire strangers to the record, when he knew that the outstanding notes had neither been paid nor cancelled, he certified the property as free from this incumbrance, without the knowledge or consent of the real parties in interest. We perceive the grossest negligence and irregularity in this conduct; and while it is a matter of regret that innocent parties should be made to suffer the consequences, yet we cannot fail to see that Ward was acting in this regard as the attorney or agent of the company alone, and they are, therefore, chargeable with his knowledge concerning the contents of the deed, and that he had no right to execute the release, or give the certificate of title which he furnished at their request. It is settled by the authorities cited in complainant's brief, that a mortgagee with knowledge of the fraudulent discharge of a prior mortgage is not a *bona-fide* purchaser. By the principles of law already explained, the defendant is to be charged with such notice or knowledge as Ward had acquired upon the subject of the title; and if this is correct, and I do not see but that it is, the conclusion follows that the company do not occupy the position of a purchaser without notice. The company, by operation of law, is bound by the notice acquired by its representatives in Washington; so that, in either point of view, the complainant is entitled to the benefit of his security.

It was urged on the argument that Ward was the trusted agent of the *cestui que trust*, that they had clothed him with

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authority to release the deed, and they were concluded by his act, especially as the company had taken their conveyance in good faith. It is scarcely necessary to discuss this view after what has been said. Precisely the same circumstance existed in *Burnstine v. Ormes*, 2 MacA., 219, which has since been affirmed at the October term of the Supreme Court. There the payee in the note, who had passed it away, represented that he was still the holder thereof, and fraudulently procured Ward to execute a release of the trust deed, and afterwards, as in this case, a second deed of trust was executed upon the property to secure this insurance company upon a loan of money.

The release was set aside and the first trust deed restored to its priority. The point now under consideration was neither discussed nor decided. The silence of both this court and the Supreme Court is significant that the point was not deemed material. In the present case, however, the employment of Ward by the company is so clearly established by the proofs that our decision in the present case should not vary from that made in *Burnstine v. Ormes*, upon the strength of this additional circumstance.

The judge further expressed an opinion that a decree against Aistrop & Dudley for the amount due upon their note to complainant might be entered in this case, with a direction that the company might be subrogated to any benefit arising therefrom upon satisfying complainant's claim.

CARTTER, Ch. J., also delivered an oral opinion, in which he expressed himself to the effect, that the legal rights of the principal parties in litigation were to be determined by the testimony in respect of the relations existing between Bigelow and the company; that, in the better of his opinion, Bigelow was to be regarded, for certain purposes of intelligence and communication, as the agent of the company, and therefore that whatever was communicated to him must be regarded as communicated to the company; that, however, he regarded this conclusion as not without doubt, but the doubts were not

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sufficiently strong to induce him to dissent from the result so clearly reached by his brethren. He would therefore make the judgment unanimous.

Decree affirmed.

THE UNITED STATES v. JOHN R. BROOKS.

CRIMINAL.

- I. Putting a forged deed of real estate on record is, in itself, an act of uttering and publishing.
- II. It is competent to show that a loan of money was obtained on a deed of trust upon the property in such forged conveyance as evidence of the fraudulent intent with which it was executed.
- III. The jury was properly instructed that, while the procuring of money on the security of a deed of trust executed by the grantee in a forged conveyance was not proof of the forgery, still it is to be considered as a circumstance in relation to the utterance of the forged deed, and in relation to the intent with which it was uttered.
- IV. The intent to defraud the person whose name has been forged may be inferred by the jury when the deed conveys away his property, and the defendant has uttered the forged deed with knowledge of its character. This is the rule, although there was no actual intent to defraud the person from whom a loan was subsequently made upon the strength of the forged title.

STATEMENT OF THE CASE AND DECISION.

The defendant was indicted for forging a written conveyance of real estate in the city of Washington.

The indictment set forth the alleged forged instrument, conveying lot 5 in Davideon's subdivision of square 283 to one Hannah Brooks for a consideration of \$3,500, and purporting to be executed by Charles Baker and Sarah E. Baker, his wife, on January 27, 1877. It was acknowledged and delivered to the recorder of deeds on the same day. The concluding averment is, that the offense was committed "with intent to defraud the said Charles Baker against the form," &c.

Anthony Brooks and Mary Dangerfield were also included as defendants; but John R. Brooks was brought to trial separately, and without the others.

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The plea was not guilty. The jury returned a verdict of guilty against the said John R. Brooks.

From the bill of exceptions it appears that upon the trial the government introduced testimony tending to show that the real estate described in the deed set forth in the indictment belonged to Charles Baker, who had died since the finding of the said indictment; that his name was Charles Hall Baker, but he always signed his name as Charles Baker, and was known as such among his acquaintances; that said deed described in the indictment as from Charles Baker to Hannah Brooks was forged, and that the defendant, John R. Brooks, delivered the same to the recorder of deeds for record on the 27th day of January, 1877. And to further maintain the issue joined, the government called one John W. Starr, who testified that on the — day of February, 1877, the defendant, John R. Brooks, presented to him (Starr) a deed of trust dated on the 3d day of February, 1877, and executed by one Hannah Brooks, conveying the real estate described in the indictment in trust to secure a certain promissory note made by said Hannah Brooks to the order of one James Carroll for \$2,000, and endorsed by him, and said John R. Brooks requested an advancement to him of money thereon, upon which said note and deed of trust he (Starr) advanced to said Brooks the sum of \$2,000; or, to state this part of the case more clearly, on the 3d day of February, 1877, the defendant Mary Dangerfield, under the assumed name of Hannah Brooks, made a promissory note to the order of James Carroll for \$2,000, and to secure it executed on the same day a trust deed to William W. Metcalf, trustee for James Carroll, upon the same property (lot 5), and it was recorded on the same day. In the same month of February, but on what day is not positively known, the defendant John R. Brooks presented the same trust deed and note for \$2,000, endorsed by James Carroll, and requested and obtained from John W. Starr a loan upon the same. There was, in fact, no such person as Carroll.

To all this testimony of the said Starr, the defendant, John

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R. Brooks, by his counsel, objected, and asked the court to exclude said testimony from the consideration of the jury, for the reason that said deed of trust and note, having been executed and delivered to said Starr long after the making and recording of the alleged forged deed from Charles Baker to Hannah Brooks, (dated January 27, 1877, and recorded on the same day,) and forming another and entirely distinct transaction, were neither admissible nor competent evidence to maintain either count of the indictment; but the court overruled said objection, and declined to exclude said testimony from the consideration of the jury, and admitted the same as evidence of the fraudulent intent with which the said original deed was executed, holding that the obtaining of money on the deed of trust upon property which had been conveyed by a forged deed immediately or shortly previous thereto, was evidence of the fraudulent intent with which the original deed was executed. This ruling is the subject of the first exception.

At the close of the testimony counsel for defendant requested the court to instruct the jury as follows:

"1. That to constitute an utterance or publication of the forged deed in this case, the defendant must have done some act with the deed itself, or have uttered some words in direct reference to it, or both, such as would amount to the assertion that it was a genuine deed, and with the intent at the same time to procure credit for the same, and thereby secure an advance of money or some advantage to himself; that the single act of putting said deed on record, or leaving the same for record, is not, in itself, an act of uttering and publishing."

But the justice presiding at the trial refused to give such instruction; to which refusal counsel for defendant excepted.

"2. That if, after the execution and record of said deed, the defendant approached the witness Starr, and procured of him an advance of money on the security of a deed of trust executed by the grantee in said forged deed, that act alone

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was not an utterance of said forged deed, and is not competent proof to be given under the indictment in this case."

But the justice presiding at the trial refused to give the said instructions as asked; but did instruct the jury that, while the procuring of money on the security of a deed of trust executed by the grantee in a forged deed was not evidence of the forgery, still the jury might consider it as a circumstance in relation to the uttering of the forged deed, and in relation to the intent with which the forged deed was uttered; to which refusal counsel for the defendant excepted, and to the instruction as given also excepted.

"3. That the allegations of the intent to defraud Charles Baker contained in the indictment are material, and must be proved as laid; and if, under the instruction of the court, the jury should find that the defendant uttered the forged deed with knowledge of its character, but without any intent to defraud Charles Baker, they cannot convict him on the count for uttering."

But the justice presiding refused to give the said instruction as asked; but did instruct the jury that if they should find that defendant uttered the forged deed with knowledge of its character, the deed being one conveying away the property of Charles Baker, then the jury might infer the intent to defraud Charles Baker; to which counsel for the defendant excepted.

"4. If, under the charge of the court, the jury shall find that the procuring of an advance of money from Starr, as set forth in his testimony, was an utterance of the forged deed, and that the same was done to defraud Starr, the defendant cannot be convicted on the count for uttering said forged deed."

But the justice presiding refused to give such instruction; but did instruct the jury that if they believed from the testimony that the defendant forged or uttered as true a forged deed of the property of one Charles Baker, that they could infer therefrom the intent to defraud Charles Baker, he being the owner of the property; to which refusal to give the instruc-

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tion asked, and to the instruction given, the defendant, by counsel, excepted.

A motion for a new trial upon these exceptions is heard here in the first instance.

At the conclusion of the argument, CARTTER, Ch. J., announced the decision of the court, overruling the exceptions, denying the motion for a new trial, and remanding the case to the Criminal Court.

H. H. Wells, District Attorney, for the prosecution.

A. G. Riddle, for defendant.

CATHARINE A. BECKETT v. WILLIAM TYLER ET AL.

EQUITY.—No. 4796.

- I. A court of equity will only sustain a purchase by a trustee from his *cestui que trust* where it is deliberately agreed and understood between them that the relation shall be considered dissolved, and there is a clear contract, ascertained to be such after a zealous and scrupulous examination of the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, and that there is no fraud, concealment, or advantage taken by him.
- II. A party is not considered an innocent purchaser of real estate, as against prior equitable titles, where the record discloses such facts and circumstances as are sufficient to put him on inquiry.
- III. Where circumstances of fraud exist on the part of a purchaser of real estate or his assignee with notice thereof, he will not be entitled to compensation for improvements made on such fraudulently acquired property.

STATEMENT OF THE CASE.

The bill charges that on the 28th day of September, 1874, Eli Beckett, the husband of complainant, being seized of a lot of ground and improvements in the city of Georgetown, known as the Beckett Hall, conveyed the said property to the defendant William Tyler, in trust, to hold the same for the

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sole and separate use of said complainant, her heirs and assigns; and upon the further trust, whenever requested by her so to do, to unite with her in mortgaging or conveying the same absolutely in fee-simple, &c.; that on the 23d day of October, 1874, the said William Tyler procured to be recorded a deed purporting to be from himself as trustee and the complainant to the defendant Frank P. McDermott, an employee in his office, and who acted in this behalf as his agent, for the pretended consideration of \$1,000, as expressed in said deed; that said deed was never signed or acknowledged by said complainant, nor did she or the said Tyler ever receive the said consideration, or any other consideration, on account of the same; that said deed was fraudulent, and was made for the purpose of having the property reconveyed by said McDermott to said Tyler in fee; that on the same day, and in pursuance of such fraudulent understanding, the said McDermott did reconvey the said property to said Tyler for the pretended consideration of \$2,000; that at divers times subsequently the said Tyler procured loans of money, and executed deeds of trust upon said property securing the same, which deeds of trust were released.

The said Tyler, on the 18th of November, 1875, conveyed said property to the defendant Saville, for the pretended consideration of \$1,200; that at the time of said conveyance to said Saville, and long prior thereto, the said Tyler was indebted to said Saville, and that the said conveyance was made in attempted liquidation of said antecedent indebtedness, or a part thereof, and that at the time of said conveyance said Tyler was notoriously insolvent.

The prayer of the bill was that the pretended conveyance purporting to be from Tyler and herself to McDermott, and the subsequent conveyance, be declared fraudulent and void, and for general relief.

Decrees *pro confesso* were taken against some of the defendants; the others answered, and among them McDermott, who admitted the execution of the deed from himself to Tyler at said Tyler's request, but denied all knowledge of fraud, actual

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or contemplated, on the part of said Tyler against the complainant.

At the final hearing the contest had narrowed down to a controversy between the complainant and defendant Saville as the only parties in interest.

The answer of defendant James H. Saville denied that the deed to McDermott was fraudulently obtained, and alleged that it was executed and acknowledged by the complainant with full knowledge of its purport and effect; that the consideration was a good and valuable one; that Tyler believed he had a good title and proceeded to expend a large sum of money in improving and making the said property available; that having heard that a certain incumbrance of \$500 upon the property was fraudulent, he sent for complainant; that she stated, in relation to her transactions with Tyler concerning the property now in dispute, that she agreed with the said Tyler to exchange said property for a house and lot on Dunbarton street, in Georgetown, then owned by Tyler.

He admitted the deed from McDermott to Tyler, but has no knowledge that the consideration was not paid; admits the other conveyances mentioned, but has no knowledge of frauds, want of consideration, or other allegations. He admits the conveyance from Tyler to him of 18th November, 1875, but denies that the consideration of \$1,200 was in any sense pretended; but alleges that said \$1,200 was an amount of money owing to him by said Tyler and payable on said day, and denies all knowledge that Tyler was then insolvent. He also filed with his answer a cross-bill, in which he prayed that an account be taken of what had been expended by Tyler for improvements, and that he be required to produce his books, &c.; that if the conveyances whereby the title in fee was vested in said Tyler be declared void, then that Catharine A. Beckett be decreed to pay him the amount of money expended by Tyler for improvements, and for general relief.

The court below decreed a dismissal of the bill, from which decree the complainant appealed to the general term.

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Hugh T. Tuggart and *Frank T. Browning*, for complainant.

The deed to McDermott was fraudulent, and fraud cannot operate as the foundation of any title, legal or equitable. It is contended on behalf of defendant Saville that the complainant did execute the deed to McDermott, but, proceeding upon this hypothesis, it appears beyond doubt from the evidence that she never received any consideration from it, and that at the time of the conveyance to Saville her equities against Tyler were clear, and the said deed could have been avoided at her instance. (Perry on Trusts, p. 168, *et seq*; *Wormley v. Wormley*, 8 Wheat., 421; *Michoud v. Girard*, 4 How., 503.) The defendant Saville is in no better position with regard to complainant than Tyler was, because, first, the consideration of the deed from Tyler to him was a pre-existing indebtedness of said Tyler to him, and he parted with no new consideration. The transfer of property as a new security for an old debt is not sufficient. (Perry on Trusts, 192; *Root v. French*, 13 Wend., 570; *Clark v. Flint*, 22 Pick., 231; *Burrett v. Nosworthy*, 2 White & Tudor, pt. 1, p. 100, and cases cited; *Dickson et al. v. Tillinghast et al.*, 4 Paige, 215, *et seq.*) Second, he cannot be regarded as a *bona-fide* purchaser without notice; for the pretended conveyances were matters of record, and upon their face were sufficient to put him upon his inquiry. The testimony shows that he caused the title to be examined, and even had the objectionable deeds in his possession. They showed him that the transaction, regarded in the most favorable light, was a dickering between the trustee and *cestui que trust* in regard to the trust property, which is obnoxious to all the rules of equity, and in general utterly prohibited. He was bound to satisfy himself by actual inquiry of the honesty and good faith of the trustee's transactions. (Perry on Trusts, 194-196; *Oliver v. Piatt*, 3 How., 479.) Third, the evidence shows that the conveyance from Tyler to Saville was not the voluntary act of Tyler, but was procured by duress; that he went to the office of Tyler, retired with him to a private room and locked the door, (and at a time when complainant was in the

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outer office of said Tyler, waiting to see him in reference to said property,) and there procured by threats Tyler's consent to said transaction. A conveyance thus obtained is invalid, not only as to the parties, but as to third persons. (*Huquenin v. Basely*, White & Tudor Lead. Cas., vol. 2, pt. 2, p. 1261, and authorities cited.) As to the matter of the so-called improvements, the expense of which the defendant Saville claims, in case the conveyances mentioned in the bill are set aside by the court, the testimony shows that they were a disadvantage to the property, and, in point of fact, made it less valuable than before; but in any event the defendant Saville can have no claim to the same. He is in no better position than Tyler, the trustee, and it is well settled that the trustee is not entitled to be paid for improvements. (*Green et al. v. Winter*, 1 Johns. Ch. Rep., 26; 2 Story's Eq. Jur., p. 462, *et seq.*) It must appear from the foregoing that, taking any view of the case, regarding the complainant in either of the only two possible lights in which she can be considered under the testimony—that of the victim of a deliberate fraud, or the victim of misplaced confidence—her rights against Saville are equally clear.

Th. Jessup Miller, for defendant Saville.

It is true, and if it be material in this cause it is proved, that, in acquiring the property in the first instance from Mrs. Beckett, Tyler committed frauds upon those persons; but it is also true and is equally proved that the defendant Saville did not have notice of these frauds at the time of his purchase. The whole doctrine of *bona-fide* purchasers, with full citations of the authorities, may be found in the notes to the case of *Barrett v. Nosworthy*, 2 White & Tudor's Leading Cases in Equity, pt. 1, p. 33, *et seq.* The law is, that a *bona-fide* purchaser for value and without notice is a good defense against all prior equities and against all adverse proceedings in equity. (*Woodruff v. Cook*, 1 G. & J., 270; *Owings v. Mason*, 2 A. K. Marsh., 380; *Tollman v. Moore*, 21 Grat., 213; *Howell v. Ashmore*, 7 Stock., 82; *Demarest v. Wyncoop*, 2 Johns. Ch., 147;

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High v. Battle, 10 Yer., 335; *Varrick v. Briggs*, 6 Paige, 323; *Heilner v. Imbrie*, 6 S. & R., 401.) A *bona-fide* purchase is valid not only against an antecedent equity, but although the premises were fraudulently acquired by the vendor. (*Somes v. Brewer*, 2 Pick., 184; *Wood v. Man*, 1 Sumn., 506; *Gallatin v. Irwin*, Hopk., 48; *Beans v. Smith*, 2 Mass., 252; *Tufts v. Tufts*, 3 W. & M., 457.)

It is attempted to assail the impregnable position of the defendant Saville as an innocent purchaser for value, by arguing that the consideration of his purchase was not valuable, because it was a pre-existing indebtedness. The law on this subject is perfectly well settled: the transfer of property as new security for an *old debt* is not a valuable consideration, but the satisfaction of an old indebtedness is a valuable consideration for a transfer. The reason for this is, that the extinguishment of this prior indebtedness changes the position of the purchaser for the worse. (*Padget v. Lawrence*, 10 Paige, 170; *Petrie v. Clark*, 11 S. & R., 371.)

It is objected again, that because the deeds alleged to be fraudulent were recorded, the defendant Saville had notice of these frauds. There is nothing in the deeds to show or to raise a suspicion of any fraud attached to them. It does appear that Tyler acquired his title from one McDermott, who had purchased from him as trustee; but this sale to McDermott appeared to have been made with the acquiescence of his *cestui que trust*. When a trustee has fairly sold an estate, a subsequent purchase by him is unobjectionable. (*Baker v. Peck*, 9 W. R., 472.) Even if Tyler's purchase had been directly from his *cestui que trust*, it would not have been void, but voidable only, and then only upon certain terms. The leading case (*Fox v. Mackreth*, 2 Cox, 320) settled the principle upon this subject. His *cestui que trust*, even after an acquiescence, could compel a trustee to account for any undue advantage or any profits derived from such transaction; (*Thorp v. Cullom*, 1 Gilman, 615; *Ives v. Ashley*, 97 Mass., 198;) but there is no reason in the position taken by counsel for Mrs. Beckett, that such a *cestui que trust* can follow the property in

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the hands of the purchaser, and there is no authority to sustain such a position. When the property has been resold by the trustee to a *bona-fide* purchaser before the *cestui que trust* applies to the court, the original sale cannot be set aside; the remedy will be only personal against the trustee for an account of the profit. (*Jackson v. Walsh*, 14 Johns., 407; *Hawley v. Cramer*, 4 Cowen, 719; *Robbins v. Bates*, 4 Cush., 104; *Hoffman v. Cumberland*, 16 Md., 456; *Lazarus v. Bryson*, 3 Binney, 54; *Ringgold v. Ringgold*, 1 H. & G., 70.)

The evidence does not show that the conveyance to Saville was procured by duress. The answer of Tyler and of Saville and the deposition of Saville deny expressly any such statement.

When a sale to a trustee is set aside, the trustee is entitled to have the amount expended by him for purchase-money and improvements. (*Imboden v. Hunter*, 23 Ark., 622; *Bailey v. Robinson*, 1 Grat., 4; *Davoue v. Fanning*, 2 Johns. Ch., 252; *Mason v. Martin*, 4 Md., 124.) The value of the improvements would inure to the assignee of the trustee.

It is manifest that the complainant in this case, Beckett, is the party who reposed the confidence in Tyler; all of Saville's transactions with him are complete in themselves; he does not take an executory contract, but a deed of conveyance, leaving no trust to be executed and nothing to be done by Tyler. We believe no rule of law is better settled than that where innocent parties must suffer loss by the default or fraud of some other party, the loss must fall upon these who reposed the confidence, whose acts misled the other. (See *Licharow v. Mason*, 2 T. R., 70; Chitty on Contracts, 763; *Rost v. French*, 13 Wend., 573; *Gill v. Schley*, 2 Md. Ch. D., 281; *Bigelow v. Comegys*, 5 Ohio St. R., 256.)

Mr. Justice HUMPHREYS delivered the opinion of the court:

The object of the bill is to have sundry conveyances, which appear of record, affecting the title to a lot of ground and premises in Georgetown, known as the Beckett Hall, set aside on the ground of fraud.

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On the 23d of October, 1874, the legal title to the premises being in the defendant William Tyler, in trust for the benefit of the complainant, a paper-writing purporting to be a conveyance from her and the said Tyler to the defendant McDermott, an employee in his office, of the said property, in fee for the consideration of \$1,000, was made and recorded.

This deed, so far as the same purports to have been signed and acknowledged by her, complainant says is a fraud and a forgery; that she never authorized or requested Tyler to execute such a paper, and that she never received from the said McDermott, or the said Tyler, any money or other consideration whatever on account thereof.

The reasonableness and probability of her story depends upon all the surroundings of the case. There are subscribing witnesses to the deed, but their testimony is uncertain and unsatisfactory as to its execution by her.

The title does not remain long in McDermott; for on the same day he reconveys the property to Tyler in fee, relieved of any trust. The consideration named in this deed is \$2,000. Not the least singular feature of this transaction is the fact that McDermott makes a clear gain of \$1,000 off the trustee.

Tyler now frequently incumbers the property to secure loans of money made to him, and finally, on the 18th November, 1875, executes a deed conveying the same in fee-simple to the defendant Saville, for an alleged consideration of \$1,200. He has up to this time, it seems, rendered no account to his *cestui que trust* or paid her any money.

A court of equity will only sustain a purchase by a trustee from his *cestui que trust* where it is deliberately agreed and understood between them that the relation shall be considered dissolved, and there is a clear contract, ascertained to be such after a zealous and scrupulous examination of the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, and that there is no fraud, no concealment, and no advantage taken by him. (*Michoud v. Girard et al.*, 4 How., 556.)

If, therefore, the deed to McDermott were genuine, and

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there had been a failure of consideration or other irregularity in the bargain, a court of equity would not hesitate to restore complainant's former rights as against Tyler.

Saville, however, urges that complainant did sign the deed to McDermott; that he is an innocent purchaser for a valuable consideration; and that whatever may have been the wrongs of Tyler, and the credulity and confidence of the illiterate Catharine, he must not suffer.

When questioned with some particularity as to the nature of the consideration he paid for the ground, he declined to answer, on the idea that it was his private business. We think that is exactly what we had a right to know, that where the title of the person under whom he claimed was charged to be one tainted with bad faith, imposition and fraud upon the credulous and unsuspecting, it was part of his necessary defense that a full and open explanation should be made.

An innocent person must be such in fact and in deed; he must have parted with his money or other property, and not have taken a conveyance on speculation. He further claims that finding the conveyances from Tyler and complainant to McDermott and from McDermott to Tyler on record, he was justified in concluding that the title was good. This is undoubtedly correct, as a general proposition, where there is nothing on the face of the papers to excite suspicion.

The abstract of titles shows the trustee conveying to himself, through McDermott, by deeds executed at the same time and for different considerations; and whether she signed one of the deeds or not, Tyler was still her trustee, if fraud or imposition had been practiced upon her in the transfer. In this apparent condition of the title, the conveyance is made to Saville. If the facts were not sufficient to put even a person who pays out his money on his inquiry, then we are unable to see what could. But the evidence shows that the consideration of the deed to Saville was an old note, made by Tyler, which he held.

We see nothing in the circumstances to justify us in protecting Saville at the expense of the complainant; and more

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especially because we do not regard the averment that complainant did unite in the deed to McDermott, on the promise by Tyler of a lot elsewhere, as being sustained by the testimony.

The claim made for compensation for alleged improvements by the trustee, we do not consider as sustained by the proofs. Even if it were clear that any repairs amounting to improvements had been made, still the nature and character of the transaction would not authorize the court to charge the complainant with the burden thereof. It is only when fair, open dealing has been had, that a claim for improvements can be allowed.

The decree below must be reversed, and a decree entered confirming the title of the complainant.

THE UNITED STATES, ON THE RELATION OF ELLIOTT SHURTZ, v. DAVID M. KEY, POSTMASTER-GENERAL.

AT LAW.—No. 19,487.

- I. When the salary of a postmaster has been adjusted and fixed at the proper time, upon a sworn statement of the revenues of the office furnished by such postmaster, a mandamus will not issue to compel a subsequent Postmaster-General to readjust the salary so fixed by his predecessor.
- II. The adjustment of such salary is not merely a ministerial function. It requires skill and discretion, which cannot be controlled by the compulsory process of mandamus.

STATEMENT OF THE CASE.

This is an application for a mandamus to compel the Postmaster-General to readjust the salary of the relator as postmaster at Marshalltown, in the State of Iowa, for the four years commencing on the 1st day of July, 1872, and ending on the 30th day of June, 1876.

The proceeding is based upon an alleged violation of section 3854 of the Revised Statutes, which provides that the

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salaries of the postmasters shall be readjusted by the Postmaster-General once in two years, and in special cases as much oftener as he may deem expedient, &c. The mode of readjustment is laid down in section 3855 in the following words:

“In readjusting the salary of a postmaster, the amount thereof shall be ascertained by adding to the whole amount of box rents commissions of the other postal revenues of the office, at the following rates: On the first one hundred dollars, or less, sixty per cent.; on all over one hundred dollars, and not over four hundred dollars, fifty per centum; on all over four hundred dollars, and not over two thousand four hundred dollars, forty per centum; on all over two thousand four hundred dollars, fifteen per centum. And in order to ascertain the amount of the postal receipts of each office, the Postmaster-General shall require postmasters to state, under oath, at such times and for such periods as he may deem necessary in each case, the amount of stamps cancelled, the amount of box rents received, the amount of unpaid postage collected, and the amount of postage on printed and other mailable matter,” &c.

Section 3860 provides that, in regard to postmasters at offices of the first and second classes, the Postmaster-General may allow out of the surplus revenues of their respective offices, that is to say, the excess of box rents and commissions over and above the salary assigned to the office, a reasonable sum for the necessary cost of rent, fuel, light, furniture, stationery, printing, clerks, and necessary incidentals, to be adjusted on a satisfactory exhibit of the facts. And by the two following sections, the expenses and salary may be deducted out of the receipts of the office, and that all vouchers and deductions shall be submitted for examination and settlement to the Sixth Auditor. In regard to the amount of the salaries and the classification of postmasters, section 3852 provides that their compensation shall be a fixed annual salary, and they shall be divided into five classes. It then proceeds in the following words:

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"The salary of postmasters of the first class shall not be more than four thousand dollars, nor less than three thousand dollars; of the second class, less than three thousand dollars, but not less than two thousand dollars; of the third class, less than two thousand dollars, but not less than one thousand dollars," &c. The remaining two classes are still less.

The petitioner represents that the relator was appointed postmaster at said Marshalltown March 1, 1871, and that he continued to discharge the duties of the office until February, 1875, when he was reappointed, and that he has ever since held, and still holds, said office. He also represents that he received a circular from the Postmaster-General, dated June 1, 1871, requiring him to keep an account of the amount of stamps cancelled at the office for the six months beginning July 1, 1871, and ending December 31, 1871, and the amount of unpaid letters, or newspapers and other printed matter, and for box rents; and he was therein also directed to forward a sworn statement of all such amounts, so as to enable the Postmaster-General to revise and adjust the salary of the petitioner from and after the 1st day of July, 1872. That in obedience to such order, he transmitted to the Postmaster-General a statement under oath showing that the amount of stamps cancelled in money was \$3,610.42, and for unpaid letters \$54.64, and for newspapers, &c., \$229.23, and for box rent \$147.51. He claims that of this amount he was entitled to all the box rent, which, together with his commissions, made an aggregate of \$2,105.22 for the six months embraced in said statement; and he also claims that he was entitled to double that amount for the whole year, but that as the salaries of postmasters of the first class shall not be more than \$4,000, he was entitled to that amount for each of the two succeeding years.

He further represents that, on June 1, 1873, he received a similar circular from the Postmaster-General, and that he duly transmitted, as in the former instance, a statement under oath of the postal revenue of the office, to enable him

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to revise and readjust his salary for each of the fiscal years ending July 1, 1875 and 1876. He then alleges that David M. Key, Postmaster-General, refuses to revise and readjust said salary, though often requested so to do; and he concludes with a prayer for a writ of peremptory mandamus compelling him to readjust the salary of the petitioner, as postmaster as aforesaid, for the four years specified, at the rate of \$4,000 for each of said years.

The return of the Postmaster-General denies that the relator was entitled to a salary of \$4,000 for each of the years mentioned, or that there has been any refusal to readjust his salary. He attaches an exhibit from the records of the department, from which it appears that the relator was entitled to and received for each of said years the sum of \$2,900. It further appears from such exhibit that the predecessor of the present Postmaster-General made the biennial readjustments required by section 3854 on the 1st day of July, 1872, and the 1st day of July, 1874. It also appears by said exhibit that the entire amount of the revenues of said office were absorbed in the payment of the salary of said postmaster, and allowances made to him for fuel, light, furniture, stationery, printing, and clerk hire, and that this allowance was made upon the request of the relator, under said section 3860 of the Revised Statutes.

The Postmaster-General insists that the readjustment made by his predecessor in office was correct; that the relator, after having received \$2,900 as a salary, and the remainder of the revenues of the office, under requisitions made by himself for allowances that could only be made from a surplus of revenues over and above his salary, is estopped from denying the correctness of such readjustment and allowance. He also submits that if such readjustment were based upon an erroneous construction of sections 3852, 3854, 3855, and 3860, he has no power to correct the mistake, it being *res adjudicata*; and that this court has no right to compel him to ascertain the existence of the right claimed by the petitioner under the construction of doubtful laws. It

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also appears from such exhibit that the statements under oath forwarded by the relator, showing the revenues of his office, furnished the basis for the biennial readjustment of his salary for the years mentioned in his petition, and that after the salary had been fixed at \$2,900 a year, he received that amount regularly, without complaint, and drew his requisitions upon the balance of the revenue of his office for expenses under section 3860. The present Postmaster-General insists that he is entitled to no greater salary than that which was fixed at the time of such readjustment.

The application which the relator now makes is based upon the assumption that, in point of law, there has been no readjustment of his salary, for the reason that those formerly made were erroneous, in not allowing to him all the commissions upon the revenue of his office to which he was entitled under section 3855.

The facts are now sufficiently stated.

Durant & Horner, for the relator.

Now, salary is neither a judicial nor a ministerial question *in the first place*; it is altogether legislative. It is clear the departments cannot increase or diminish the salaries of your honors, or of any other officers of the United States, *because the law fixes them*. In this fixation of salary, the executive officers act *first* upon the matter; but *at last* the question rests with the judiciary to say what the law is. Had the law fixed relator's salary at \$4,000, and the executive had refused to pay it on request, and insisted in its declarations of only a portion of this sum being due, the Court of Claims would have jurisdiction. (*Williamson v. The United States*, 28 Wall., 411.)

In this case the law fixes the salary with the identical accuracy it used in *Williamson's* case. The result was to be reached by certain arithmetical procedures to be made by the defendant upon certain figures which were to be furnished by the relator. These procedures have never been made in point of law. Our case proceeds upon the theory that no

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readjustment has ever been made. The judicial action both of the Court of Claims and the Supreme Court is based on the same theory. The readjustment can only be made in one way. No choice or discretion exists in the officer. He must comply exactly with the mandate of the law. After the figures are furnished him by the relator there can be but one result to the calculation. The law does not provide for two different salaries for the same time, for the same officer, for the same performance of duty. The salary is one certain sum, ascertained and fixed by one certain account, by one certain officer, in one certain way. *Id certum est quod certum reddi potest.*

Your honors, therefore, have before you no act of any kind of readjustment. You are applied to for relief, not in a case of misfeasance or malfeasance, but of absolute *non-feasance*. Hence all that portion of the return averring a readjustment is irrelevant. The relator asks now, for the first time, of your honors, to insist upon the performance by the Postmaster-General of an act of duty imposed upon him by the law, directly within the sphere of his official life, involving no choice and no discretion. Not only is the case a plain one for the issuance of the writ from the very nature of the facts, but the highest authority has declared it the only remedy.

A. A. Freeman, Assistant Attorney-General, for the respondent, cited *United States v. Lawrence*, 3 Dallas, 48; *Decatur v. Puuldiny*, 14 Pet., 497.

In the first place, the readjustment of the salary involved the construction of a doubtful law, as laid down in sections 3855 and 3860 of the Revised Statutes. In the second place, that law was construed by the predecessor of the Postmaster-General, and the adjustment made and the salary allowed in accordance with the construction placed by the Postmaster-General on those two sections.

Section 3860 of the Revised Statutes provides that certain allowances may be made to postmasters at offices of the first

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and second classes out of the *surplus* revenue of their respective offices, that is to say, the excess of box rents and commissions over and above the salary assigned to the office.

The record shows that these allowances were made to the relator upon his requisition. He accepted the salary assigned to him of two thousand nine hundred dollars, made no objection to it at the time, recognizing the fairness of the allowance by making requisitions upon the department which he knew could only be filled out of the surplus revenue over and above his salary. It was impossible for the Postmaster-General to allow him the amount of salary claimed, and also the amount required by him for the items of rent, fuel, &c., as shown in his accounts. If, then, he failed to receive the amount of salary to which he was entitled under the law, his failure is attributable to his own neglect to demand it, or, what is still stronger against the present application, was his recognition of the fact of its correctness by drawing upon the department for supplies which he knew could only be met from the surplus revenue of his office, over and above the amount of salary that he is entitled to receive.

In deciding, then, upon the question as to whether the entire amount of the revenue of his office should be paid him as a salary, thereby rendering it impossible to make any allowance for necessary cost of rent, &c., or whether two thousand nine hundred dollars should be allowed him as salary, and the remainder devoted to other purposes, the Postmaster-General exercised his best judgment, and, with the acquiescence and consent of the postmaster, determined upon the latter course. In accordance with that adjustment his salary was paid, his vouchers for rent, light, fuel, &c., were presented to the proper department, passed upon and allowed, and the whole matter is therefore *res adjudicata*, so far as the action of the Postmaster-General is concerned.

These adjustments, it must be borne in mind, were made at the times required by law, and were not objected to by the relator. It is therefore insisted that he is estopped now from complaining that they were incorrect.

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Whatever, however, may be the opinion of the court as to the correctness of the original adjustment, it is surely beyond the power of the court to compel the present incumbent to review or revise that adjustment; for, in addition to having to exercise his judgment in the construction of the statutes under which these readjustments are made, he is called upon further to revise and review the action of his predecessor. It is difficult to imagine a case further removed from the exercise of a mere ministerial power than the one at bar. The right of mandamus in the Marburg case was maintained solely upon the ground that the act required to be done involved the exercise of no discretion. All that the Secretary was required to do was to deliver up a commission already made out and signed. In the case of Stokes and Stockton the Postmaster-General was simply required to enter a credit already ascertained to be due the petitioners.

CARTTER, Ch. J., announced the decision of the court, in substance as follows :

The petition is predicated on the right of the postmaster to the enjoyment of a salary of four thousand dollars for each year, from 1872 to 1874 inclusive, and which he claims he has been deprived of by reason of the refusal of the Postmaster-General to readjust his compensation for that period. He asserts, in absolute terms, that there was an irregular or unauthorized adjustment, but that there has been no adjustment at all of his salary, and he would be entitled to the extraordinary remedy he invokes if it be true that the head of the department still refuses to comply with the law. But it turns out, upon examination, that his salary was readjusted by the proper officer at the time required by the statute, and upon data furnished by himself for that purpose, under oath, at the request of the department. The real ground of complaint is that he was entitled to a greater salary than that he received. He therefore asserts there was no adjustment. This is specious, but not satisfactory.

The statutes have assigned certain duties to the Postmaster-

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General for the purpose of regulating the salaries of postmasters. He is to ascertain the revenues of each office at intervals of two years or oftener, according to his own judgment; and upon a statement of facts to be furnished under oath of the postmaster, he fixes the compensation, and this process is called readjustment. This cannot be regarded as a merely ministerial function. He is called upon, before coming to a conclusion, to examine details, to criticise the materials upon which he is to act, and to pronounce a result after surveying the whole matter, including the interests of the government and the rights of the officer which are involved. It is a delicate and important duty, and implies a much higher exercise of discretion than the mere ministerial duty of computing figures into sums-total.

The review of these statutes and the instrumentality by which salaries from time to time are adjusted, is a labor of great discrimination and nice reasoning, as we have discovered in the discussion of this case, and involves the exercise of skill, ability, and discretion. Now, the Postmaster-General can be compelled to enter upon the performance of this duty, but after he has acted and reached a result he is beyond the reach of the compulsory process of mandamus. This view is fatal to the application in this case. The genius of this writ, as explained by the Supreme Court and by this court, is to put an officer in motion to perform a duty devolving upon him by the law, and which he neglects or refuses to perform. It requires him simply to act, but if that action involves discretion he cannot be controlled in its exercise. Now, tested by this rule, how does the case stand upon the facts? Mr. Creswell was Postmaster-General in 1872 and in 1874. The readjustment of the salary of the relator was fixed at that time, and he received it. The commissions were fixed according to the revenue received, and allowances were made for expenses which absorbed the whole amount collected at the office. This happened in 1872, and again in 1874. The postmaster acquiesced in that adjustment, and made his requisition to defray the expenses of the

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office with reference to it. He now seeks to repudiate the action of the department, to ignore his own conduct in the matter, and to compel the present incumbent to make a readjustment of a salary which was fixed by his predecessor years ago. The former Postmaster-General has acted, and there is no authority to compel his successor to go back and undo the result and establish another standard of compensation for any postmaster. As a precedent it would be extremely injurious. Nothing but anarchy would follow. It would have a tendency to resolve the administration of the executive departments into the judicial forum, and infringe upon the constitutional distinction between the executive and judicial branches of the government. We are disposed to keep this writ within the restricted limits defined by the decisions, and to hold that it can only issue in a case where the law points out clearly a duty of a ministerial character. We do not think the case now before us furnishes any occasion for its use, and therefore deny the application.

THE UNITED STATES, EX REL. R. C. WALLACE, v. DAVID
M. KEY, POSTMASTER-GENERAL OF THE UNITED
STATES.

AT LAW.—No. 19,446.

This court will not grant a rule on the Postmaster-General to show cause why he should not be compelled to perform an executive act which requires investigation and the exercise of judgment, in a case where it appears from the petition itself that he has acted upon the subject and disposed of the question submitted to his judgment.

STATEMENT OF THE CASE AND DECISION.

This is the petition of R. C. Wallace, of the Territory of Montana, for a mandamus to the Postmaster-General. The case stated in the petition is as follows: That by section 3949 of the Revised Statutes, all contracts for carrying the mail shall be in the name of the United States, and shall be

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awarded to the lowest bidder tendering sufficient guaranties for faithful performance, without other reference to the mode of transportation than may be necessary to provide for the due celerity, certainty, and security thereof; that the petitioner was the lowest bidder for a certain mail route in the Territory of Montana for the sum of \$4,700 per annum, and filed the oath and bond required by law for the faithful performance of said service, and that it thereupon became the duty of the Postmaster-General to award the contract for said service to the petitioner, but that he refused so to do, but did award the same to Hugh F. Galen and Leander W. Black; that the proposal made by them was without the oath of the said bidders affixed thereto that they, or either them, had the pecuniary ability to perform said contract, or that their bid was made in good faith; that, however, they pretended to file a bond according to law, but that neither of them signed it before a certificate was made thereon by any postmaster, as required by law; that a certificate at the foot of said bond by H. Course, postmaster at Helena, Montana Territory, by J. Moffatt, deputy, to the effect that said Galen and Black had signed said bond as required by law, was untrue and false, as the Postmaster-General had been notified; that no contract has yet been executed, and that the awarding of said contract to Galen and Black, and the refusal to award the same to petitioner, was a breach of ministerial duty on the part of David M. Key, Postmaster-General, and which duty he can still perform.

The prayer is, that the writ issue requiring him to show cause why he should not be compelled to enter into a contract with petitioner in the name of the United States for said service, &c. The petition was submitted to the consideration of the court, and on the following morning the court announced that they had come to the conclusion not to grant a preliminary order to show cause upon the face of the petition itself, saying that the Supreme Court has decided that the late Circuit Court of this District had jurisdiction to issue a writ of mandamus to the Postmaster-General to compel him

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to perform a merely ministerial act, and as to which he had no discretion; (*Kendall v. United States*, 12 Peters, 524;) and soon afterwards, in *Decatur v. Paulding*, 14 Peters, 497, they decided that the writ could not be issued to compel the Secretary of the Navy to perform an executive act not merely ministerial, but involving the exercise of judgment. When they have subsequently had occasion to discuss this subject, they have always held that this writ was restricted to the exercise of ministerial duty alone.

A moment's reflection will discover that in the present case there is matter of investigation and for the exercise of judgment upon the statement made in the petition. The facts were before the Postmaster-General, and he has acted upon them and decided that, in his judgment, Galen and Black were the lowest responsible bidders. He has, therefore, disposed of the question submitted to his judgment, and with that we have no right to interfere. The rule to show cause is refused.

Matt H. Carpenter and James H. Eisenberg, for petitioner.

NICHOLAS H. SHEA v. JAMES C. DULIN, WILLIAM B. MOORE, WILLIAM F. HOLTZMAN, DAVID L. MORRISON, BRAINARD H. WARNER, LEMUEL M. SAUNDERS, EUGENE CARUSI, THEODORE F. GATCHEL, M. D. PECK, JAMES L. BARBOUR, AND JOHN A. HAMILTON.

EQUITY.—No. 4960.

- I. In a bill by a judgment creditor, it is absolutely necessary to aver that an execution has been issued and duly returned *nulla bona*; and it is not sufficient simply to aver that the defendant has no property subject to execution.
- II. It is not competent for a court of equity, at the instance of a subsequent incumbrancer, to divest trustees of the title to property vested in them for a particular purpose, in special confidence and with certain discretionary powers, and to substitute in their place, without their consent, any other person or persons to make a sale of the

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property or to execute the trust, in the absence of fraud, incompetency, misconduct, irregularity, or other special equity.

The case is stated in the opinion of the court.

Hanna & Johnson, for complainants.

Birney & Birney, Edwards & Barnard, and *E. Carusi*, for defendants.

Mr. Justice OLIN delivered the opinion of the court :

This is an appeal from a decree of the special term in equity, vacating a sale of sub-lot 8, square 365, in this city, made by the defendants Warner and Morrison to the defendant Gatchell, appointing a new trustee and directing a resale of said lot, in a suit instituted by the complainant as a judgment creditor of the defendants Dulin and Moore.

The cause was heard on the bill and the answers.

From the pleadings it appears that on December 11, 1875, this lot was conveyed to the defendants Dulin and Moore subject to two deeds of trust thereon; the first to the defendants Warner and Morrison to secure the payment of a certain promissory note of the said Dulin and Moore for \$2,000, the other to the defendant Saunders to secure another note for \$500, made by the same parties.

On April 6, 1876, the complainants recovered a judgment on the law side of this court against the defendants Dulin and Moore for \$200, interest and costs, and on May 12, 1876, issued a *fiery facias* thereon.

On May 16, 1876, complainant filed his bill in this cause making the trustees under said deeds of trust and the holder of the note under the one last recorded parties thereto.

At the time of filing the bill the execution issued on complainant's judgment had not been returned *nulla bona*, and it was not so returned until July 5, 1876.

The complainants asked that the whole title to this lot, and certain other real estate mentioned in the bill, be sold, and the proceeds of sale distributed among the parties entitled.

On September 26, 1876, Warner and Morrison filed their

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answer, stating that as trustees under said trust, and in pursuance of the provisions thereof, they sold the said lot to Gatchel on June 14, 1876, and had executed a deed of the same to him, and that on the 22d of the same month the latter conveyed the same to the defendant Warner and one William H. Ward to secure a note made by Gatchel to the order of George E. Emmons for \$2,000.

The sale under the deed of trust and the execution of the deed to Gatchel, and of the trust to secure Emmons, all transpired prior to the return of the *fieri facias* on the complainant's judgment against Dulin and Moore.

No proceedings were instituted by the complainant to set aside the sale made by said trustees after their answers disclosed that fact; no charges of fraud, irregularity, or incompetency on their part are made or even intimated; no offer to redeem made by complainant, or proof of any kind to show that the property sold for an inadequate price; the complainant simply relied on the bill as filed before the sale and the pleadings in the cause.

A decree *pro confesso* was obtained against Dulin and Moore; all the other parties to the bill duly answered. Ward and Emmons are not made parties.

On February 15, 1877, the court below decreed that Dulin and Moore were indebted to complainant on their said judgment; that he had filed his bill to enforce the lien thereof against said lot; that the property was incumbered as stated; that defendants Gatchel, Warner, and Morrison were served with process May 17, 1876; that said lot had been sold by Warner and Morrison under said deed of trust and purchased at such sale by Gatchel; that said sale be vacated and set aside, and that said lot be sold by James M. Johnston, who was appointed trustee for that purpose, and proceeds brought into court.

From this decree Gatchel, Warner, and Morrison appealed. It is now sought to reverse the decree below because—

First. The court could have no jurisdiction in the cause

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until an execution on the judgment had been duly returned *nulla bona*.

That not being done until after the bill was filed, and after the sale by Warner and Morrison under said deed of trust, the court was without jurisdiction in the premises.

Second. In a judgment creditor's bill seeking payment of a judgment from the equitable interests of a defendant in real estate, a court of equity can sell no more than the interest of the judgment defendant, which in this case is the equity of redemption only.

Third. That the whole title cannot be sold in a suit of this character, in the absence of agreement to that effect on the part of those holding the legal estate or prior incumbrance, and that a court of equity is without power to remove trustees under a deed of trust executed in due form, or to interfere with their powers, vested rights, or duties thereunder, at the instance of a subsequent incumbrancer with notice of the trust, in the absence of fraud or incompetency on their part, or irregularity in the execution of the power.

On behalf of complainant it is insisted that it is not necessary in a case of this kind that a return of *nulla bona* be made by the marshal before filing the complaint, and that the averment in the bill that an execution had issued and that the judgment debtors have no property subject to execution at law, is sufficient to give the court jurisdiction, and that this fact may be proved before final hearing.

I am of opinion that it is absolutely necessary that the bill when filed aver that an execution has been issued and duly returned *nulla bona*, and that such fact appear before a court of equity has jurisdiction over the property of a debtor sought to be sold by a creditor, and that an averment, in the absence of such return, that the debtor has no property subject to execution at law, is not sufficient; and that the only evidence admissible to show that the creditor is without remedy at law, is the return of *nulla bona* by a proper officer.

The return is the highest proof known to the law. The Supreme Court of the United States, in the case of *Jones v.*

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Green, 1 Wall., 380, says: "A court of equity exercises its jurisdiction in favor of a judgment creditor only when the remedy afforded him at law is ineffectual to reach the property of the debtor, and that when the aid of the court is invoked it looks only to the execution, and the return of the officer to whom the execution was directed. The execution shows that the remedy afforded at law has been pursued, and of course is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not; and from the embarrassments which would attend any other rule, the return is held conclusive."

The court below being wholly without jurisdiction when the bill was filed, none could be acquired by an amended or supplemental bill so as to affect vested rights acquired between the filing of the original bill and the amendment. (See 81 Miss., 454; 5 Bosw., (N. Y.) 477; 5 Sand., 197.)

I am also of the opinion that it is not competent for a court of equity, at the instance of a subsequent incumbrancer, to divest trustees under deeds of trust of the title to property vested in them by parties competent to contract, for a particular purpose, upon special confidence and with certain discretionary powers, and to substitute in their place, without their consent and of all interested in the premises, any other person or persons to make a sale of the property or to execute the trust, in the absence of fraud, incompetency, misconduct, irregularity, or the like. In this case no such consent appears, and there is not even an intimation or suspicion of any misconduct, incompetency, or irregularity on the part of the gentlemen who made this sale.

Deeds of trust to secure debts are recognized in law as valid, and the authority granted to the trustees and its exercise are matters which rest wholly upon the convention of the parties thereto, and the contract and the rights of the parties thereunder cannot be disturbed by either a court of equity or of law, except upon certain well-known principles which govern all contracts.

The court cannot by main strength lay hold of trustees

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under deeds of trust and divest them and other parties interested of their rights and powers thereunder.

In the case of *The Bank of the Metropolis v. Guitschlick*, 14 Peters, p. 19, it was held that in the case of a deed of trust, unless in case of some extrinsic matter of equity, a court of equity never interferes; and the only right of the grantor in the deed is the right to whatever surplus may remain, after sale, of the money for which the property sold.

Applying the principle laid down in this case to the one at bar, it is clear that there is nothing for the complainant on his judgment, there being no surplus of the proceeds of sale after the payment of the \$2,000 note secured under the trust, and that so far as this property is concerned the bill should be dismissed.

Had the court jurisdiction when the bill was filed, the only relief the complainant was entitled to, as against the trustees and the parties secured by the deeds of trust, was a discovery as to the amount due, so that the value of the equitable interest of Dulin and Moore could be ascertained and an intelligent sale made.

I am clear the decree for a sale of the whole title without the consent of the trustees and the beneficiary under the trust is erroneous. The decree below should be reversed and, as to the said lot 8, the bill be dismissed with costs.

W. BOWIE TYLER v. SAMUEL C. BUSEY.

EQUITY.—No. 5127.

- I. The contract obligation of parties to negotiable paper is, that a person makes a note because he owes the money to the payee and endorser, and no one is under any obligation to deal with it under any other presumption.
- II. Where a note is made for the accommodation of the payee, and the latter puts up his own property as collateral security for its payment upon obtaining a discount thereof, such collateral may be changed to secure other liabilities, where the holder had no notice that the

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maker made it for such accommodation, and had no notice of any agreement between the original parties that the payee was to secure its payment.

STATEMENT OF THE CASE AND DECISION.

Complainant's bill alleges, in substance, that he gave to William Tyler, and solely for the accommodation of the latter, his promissory note, dated 26th October, 1875, and payable sixty days after date, with interest at the rate of eight per cent. per annum, at the bank of Offley & Co., in Washington, D. C.; that said note was given with the understanding that the payee, on negotiating it, should secure it by a good and sufficient collateral; that said payee negotiated the note to defendant, pledging as security for its payment a coupon bond of the Orange and Alexandria Railroad Company for the sum of five hundred dollars, with coupons to and including 1st March, 1875, and that the value of this bond was more than sufficient to satisfy the note; that when the note was about to mature, the defendant, still holding said collateral, agreed to give complainant time; that complainant gave defendant his note for two hundred and fifty dollars, dated 28th December, 1875, and payable thirty days after date, with interest at eight per cent. per annum, at the office of Riggs & Co., and took up the original note; that subsequently the defendant told complainant that if he would pay said renewal note and get an order for said bond from William Tyler, he would deliver said collateral to complainant; that complainant procured such order, and offered defendant the money to take up the note upon the surrender of the bond, but defendant refused to surrender the same, and that complainant is still ready and willing to pay said note upon the delivery of the bond; that defendant has instituted on the law side of this court, in case number 16,328 of the law docket, a suit against complainant upon the said note. Complainant therefore asks for an injunction against said action at law, and for the surrender of the said collateral, and prays that defendant shall answer. Defendant's oath is not waived.

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Defendant's answer denies all knowledge that said original note was given for accommodation, or was given with the alleged understanding as to collateral security, and therefore denies the fact; denies that at the time said original note matured or was renewed, he held said bond as collateral for the same; and alleges that on 15th November, 1875, long before maturity of the original note, said William Tyler had executed and delivered to him an assignment and agreement, whereby the said bond, with other securities, were pledged to secure the endorsement of said William Tyler on certain notes described in the agreement and held by defendant; that thereby the said bond was transferred, as collateral security, from the particular note described in the bill of complaint to the liabilities described in the assignment. He denies that he had, at the time of said transfer, any notice or knowledge that said original note was claimed by complainant to be, or was in fact, an accommodation note; and alleges, on the contrary, that he was informed, when he took said note, and believed the fact to be, that it was given to payee in satisfaction of a debt due from complainant. He denies that he ever told complainant that he would deliver said bond to him on payment of said renewal note and presentation of an order for it from William Tyler, and denies that such order was procured by complainant with any such understanding. He denies that complainant tendered him the money to take up said note, or informed defendant that he had an order for said bond; but admits that complainant said he was ready to pay said note on receiving said bond, and that defendant refused to surrender the same. He admits the institution of the action at law, and denies specifically each allegation of fraud.

The bill and answer were both under oath.

It will be observed from this statement of the pleadings, that the complainant alleges that he became the maker of the note in question for the accommodation of William Tyler, his brother, and he testifies as a witness to the same facts. The defendant denies this in his answer, and in his testi-

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mony he swears that William Tyler came to his office with the note, and stated that his brother, W. Bowie Tyler, had given it to him in payment of the last installment which he owed him for some property which he had purchased from him, William Tyler. It is also clear, from the evidence in the case, that the defendant Busey had no notice or knowledge that complainant was an accommodation maker until after the note was due. The allegation in the bill, that the note was given to William Tyler by the complainant with the understanding that the payee, on negotiating it, should secure it by good and sufficient collateral, may also be accepted as a fact in the case. The answer, however, denies all notice or knowledge of the alleged understanding as to collateral security; and Busey, in his testimony, swears positively that when he took said note he told William Tyler that he would require security, and that the latter then left with him a \$500 Orange and Alexandria Railroad bond as collateral security, and that he made a memorandum on the margin of the note that it was so secured. He also swears that William Tyler said nothing to him about any arrangement between himself and his brother in relation to the bond when it was so deposited at the time he bought the note.

Another circumstance in the case relates to the assignment set up in the answer. This assignment was executed on the 15th November, 1875. The note was not due till the 28th of December following. Busey testifies that he held certain notes which he had discounted for William Tyler; that he became persuaded that some of these notes were not genuine, and that he mentioned this to William Tyler, who then promised to make this assignment in order to make Busey entirely secure; that he knew the note of W. Bowie Tyler was genuine, and that he supposed William Tyler was the owner of the bond, and that he got it from him as his own property. There appears to be no doubt but that it was his own personal property. The assignment in question embraced this bond as collateral security for other debts. He

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also states that he sold the bond by virtue of such assignment, and applied the proceeds to the payment of the notes mentioned in the assignment, and which were not paid at maturity. It appears, from his answer and his testimony, that the assignment was made, and the proceeds of the bond applied to other liabilities several weeks before the maturity of complainant's note, and before Busey had notice that complainant was an accommodation maker thereon.

Another fact remains to be stated: the note was renewed, complainant paying the interest and giving a new note for the same amount, payable in thirty days. It was about this time that Busey is shown to have acquired a knowledge that complainant was an accommodation maker, and after he had sold the bond in question and applied the proceeds as already mentioned. When complainant called upon Busey with the money to take up the note given in renewal, and having an order from William Tyler for the bond, the defendant refused to surrender the bond, claiming it under the aforesaid assignment. These are all the facts material to be considered.

On the hearing below, the special term decreed a perpetual injunction in the action at law, and required the proceeds of the sale of the bond to be first applied to the payment of the note of W. Bowie Tyler. The cause is here upon an appeal from this decree.

At the conclusion of the argument, all the justices who heard the case were of opinion that the decree below ought to be reversed, mainly on the ground that upon the face of the note the complainant appeared as the maker and debtor and William Tyler as the payee and creditor, and that the note itself certified this relation of responsibility among the parties to it. The contract obligations of parties to negotiable paper are established to be, that a person makes a note because he owes the debt to the payee and endorser, and no one is under any stress to deal with it upon any other presumption. In the absence of any notice to Busey,

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he was at liberty to infer this relation of the parties upon the paper when he bought it from William Tyler.

And again, when Busey demanded collateral security from William Tyler, he had a right to infer that the bond belonged to him; and there is no doubt but that it was his own individual property, and he delivered it to Busey on his own account and to procure a discount for his own use. Busey had no knowledge of any understanding between the complainant and his brother, William Tyler, upon the subject of securing the payment of the note when discounted, nor did he know that their responsibility on the paper was different from what it appeared to be on its face. In view of these features of the testimony, the court could not see why William Tyler could not assign the bond, with the consent of Busey, to secure any other liability. It was equally for the benefit of William Tyler, whose property it was, and without any notice to Busey, at the time of such transfer, that the complainant was a surety or entitled to any other equity.

The decree is reversed and the bill dismissed.

William D. Cassin, for complainant.

James G. Saville, for defendant.

ANNE F. DARBY v. THE FREEDMAN'S SAVINGS AND
TRUST COMPANY ET AL.

EQUITY.—No. 4680.

- I. A married woman who mortgages her separate estate for the debt of her husband acquires the rights and privileges of a surety.
- II. If the principal could claim a right of set-off in a court of equity, the surety is entitled to the same benefit. This principle applied to a case where a husband and wife united in executing a trust deed upon his property, and also upon her separate estate, to secure the promissory note of the husband to a trust company which became insolvent, having in its hands at the time of its failure a cash deposit of the wife; and after the death of the husband it was decided that the

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claim of the wife might be set off against that of the trust company, and that the latter was entitled only to the difference between the two amounts.

STATEMENT OF THE CASE.

The statement is mainly taken from the brief of defendant's counsel.

The bill in this cause alleges that the complainant is the owner of lots numbered 317 to 333 inclusive, in Uniontown, county of Washington, District of Columbia, and that she is the sole executrix of the last will and testament of Ralph H. Darby, deceased, late of said county and District.

That by a certain deed of trust dated August 23, 1872, the said Ralph H. Darby and said complainant, his wife, intended to convey the said lots unto the defendants Alvord and Stickney, in trust, to secure to the defendant the Freedman's Savings and Trust Company the payment of a certain promissory note of said Ralph H. Darby of same date, for the sum of \$2,000, bearing interest at the rate of ten per centum per annum. The said trust deed contains the ordinary provisions as to sale upon default in payment of said note or interest, and release and reconveyance upon payment of the said debt. That said note is now held by the defendants Creswell, Purvis, and Leipold.

That the said Ralph H. Darby at the time of the execution of the said deed of trust was seized in fee-simple of lots 317 to 321 inclusive, and was seized in fee-simple of the residue in trust for said complainant during her life, and after her death in trust for the heirs of said complainant by the said Ralph begotten or to be begotten, in fee-simple, subject to a power of direction and appointment reserved to said complainant.

That said Ralph H. Darby died on the 9th of March, 1875, and by his will devised and bequeathed to the complainant all his real and personal estate for her own use and benefit forever, and appointed said complainant to be his sole executrix. That at the time of his death the said Ralph H. Darby

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was the owner of lots 317 to 321 inclusive, and held the residue, to wit, lots 322 to 333 inclusive, in trust as aforesaid. That said Ralph H. Darby died without issue, and that the said trusts descended upon and vested in one William J. Darby, the only brother and heir at law of the said Ralph, and that the complainant has fully executed her said power of direction and appointment, and that she has by certain mesne conveyances become the legal and beneficial owner of all the property and estate which devolved upon the said William J. Darby in trust as aforesaid.

That the Freedman's Savings and Trust Company is indebted unto the complainant for money loaned to said company from time to time since the execution of the said deed of trust, in the sum of \$1,752, with interest from July 11, 1874, and that she has a right to offset said sum against the amount that may be due by reason of the said promissory note, and that at the time of making such loans it was agreed that they should be applied to the payment of said note and interest, and that the complainant did so apply them.

That the installments of interest were punctually paid, including that which fell due February 23, 1875; that on August 21, 1875, complainant offered to the defendants Creswell, Purvis, and Leipold payment of the installment of interest then about to fall due, as also the principal amount of said note and interest, subject to the set-off above mentioned, and at the time requested the said Alvord and Stickney to execute and deliver a release of the said lots, but that the said defendants refused to accept said tender and to make such release.

That the Freedman's Savings and Trust Company has no lawful authority to obtain a lien upon said lots by reason of said trust deed; that against said Ralph H. Darby and those claiming under him, the said deed is null and void, but that the same is a cloud upon complainant's title and ought to be cleared away.

The bill prays for an account, release, injunction, and general relief. To the said bill the commissioners of the Freed-

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man's Savings and Trust Company filed an answer, in which they admit the making of the said deed of trust, and that there now stands to the credit of the complainant upon the books of said company the sum of \$1,752. But they aver that said complainant has no right to set off the amount of such credit against the promissory note of the said Ralph H. Darby, and that she is entitled to her *pro rata* share only of the said credit, payable in the same manner as other creditors of the said corporation are required to be paid by law; and they deny that there was any agreement by and between the said company and the complainant that her deposits should be accredited upon said note. They admit the tender of August 21, 1875, and the request of complainant for the execution of a release, and their refusal to accept said tender and to authorize the execution of said release. They deny that the said Freedman's Savings and Trust Company has no authority to obtain a lien under said deed, and also deny that it is null and void as regards those claiming under the said Ralph H. Darby.

The commissioners of the Freedman's Savings and Trust Company filed a cross-bill, setting forth substantially the same facts mentioned in their answer to the original bill of complaint, and praying for a sale of the said property and for general relief; to which cross-bill the complainant filed an answer of the same tenor as her original bill of complaint.

The facts appear in the testimony to be as follows:

On the 28d day of August, 1872, one Ralph H. Darby, now deceased, borrowed from the Freedman's Savings and Trust Company the sum of \$2,000, for which sum he executed and delivered to the company his promissory note, bearing date on that day, payable to the company one year after date, with interest at the rate of ten per centum per annum until paid. To secure the payment of this note the borrower and the plaintiff, who was his wife, executed, duly acknowledged, and delivered to the company a deed of trust whereby they conveyed to the defendants Alvord and Stickney the premises mentioned in the proceedings. This deed contains the powers

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of sale and the trusts usual in deeds of trust in this District given to secure the payment of money.

Part of the property conveyed to Alvord and Stickney as security for this note, was vested in Ralph H. Darby in trust for the use of his wife, the complainant, during her life, and subject to her disposition by will or otherwise. The residue was owned absolutely by Darby.

On the 20th day of February, 1873, the complainant deposited upon interest with the Freedman's Savings and Trust Company the sum of \$2,500 on her own account, upon which the company allowed interest from the date of the deposit according to their regulations. This money so deposited was her individual and separate property, and had been sent to her from England. A deposit book containing the regulations of the institution and an entry of each item of her account was given to her as her voucher for the money. On the 26th day of March, 1873, she deposited \$50 additional, and in the following months of July and January she was credited upon this book for interest on her deposit the sum of \$125.

On the 28th day of April, 1874, being desirous of obtaining the sum of \$2,000 out of this amount, she, with her husband, went to the officers of the company and requested them to pay her that sum; the officers declined to comply with this request, because the rules of the concern required sixty days' previous notice of the intention to withdraw funds, but they agreed to and did open a "business account" with her, and placed therein to her credit the sum of \$1,000, subject to her check. This sum of \$1,000, in conformity with the understanding of the parties, was drawn from her interest-bearing deposit. She drew checks from time to time, between that date and June 19, 1874, upon this "business account," amounting to \$903, and they were all paid.

On the 29th day of June, 1874, the Freedman's Savings and Trust Company closed its doors, and on the 11th day of July, 1874, the commissioners (defendants) took possession of the books, assets, &c., of this corporation.

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There appears to be no sufficient evidence of the alleged agreement to appropriate the deposit in Mrs. Darby's name to the payment of the note, and the court did not give it much weight.

On the hearing of the cause at special term the court passed a decree ordering the Freedman's Savings and Trust Company to credit the complainant with said sum of \$1,752 and interest from July 11, 1874, upon said promissory note, for the execution of a release upon payment of the balance by September 22, 1877, and enjoining the defendants from making sale of the said property under said deed of trust, and from instituting any proceedings for the purpose of enforcing the payment of the demand represented by the said promissory note.

From said decree the defendant the Freedman's Savings and Trust Company appealed to the court in general term.

C. Ingle, for complainant.

The defendant the Freedman's Savings and Trust Company is *insolvent*, having gone into liquidation nine days after the passage of the act of Congress of June 20, 1874, to amend its charter. Apart from the appropriation of the plaintiff's deposits intended and made by Darby and the plaintiff and the plaintiff's trustee, to say nothing of the company's assent thereto, it would be inequitable to compel the plaintiff to receive only a dividend of twenty cents on the dollar, and at the same time to pay the commissioners, for the benefit of the other creditors, the whole of what was due the company. For the doctrine of mutual credit in equity, see 2 Story Eq. Jur., sec. 1435; Waterman on Set-off, 2d ed., pp. 175, 176, note; *Simson v. Hart*, 14 Johns. R., 63, 75, 76. All the bankrupt acts, English and American, and the statutes of set-off, apply this rule in case of the distribution of a bankrupt's effects, or the estate of a decedent, *at law*. Courts of equity were in possession of the doctrine before the law interfered: per Lord Eldon in *ex-parte Stephens*, 11 Ves., 27. (See, also,

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Montague on Set-off, 2, 3, 4, 5; 5 Ves., 108; 12 Ves., 343; Byles on Bills, 358.)

Enoch Totten, for defendants.

The only question here is whether or not Mrs. Darby, by the devise of her husband to her of this property, has obtained a right to set off her own account against the debt secured upon the land thus devised to her. This court has so often decided that the debtors of an insolvent banking institution cannot obtain an advantage over other creditors, by purchasing outstanding claims against the institution, that it is needless to discuss the question further.

There is no real distinction between such a case and this. In both cases a creditor and a debtor of the insolvent concern come together, and one sells to the other. In this case the debtor sold (or devised) to the creditor. In the cases formerly before the court the creditor sold to the debtor. Here there are found none of the elements of a claim for a set-off whatsoever. Mrs. Darby is not personally bound for the payment of the note made by her husband; no action could be maintained upon the note against her, and hence she could not plead a set-off.

The equitable view of the case gives her still less advantage. To give her the whole of her debt due from the corporation in this way, whilst other less lucky creditors, whose equities are just as strong as hers, must be content with fifty per centum, would be glaring injustice. Equality is equity. The fact that Mrs. Darby has had the good fortune to receive a large legacy, constitutes no reason why she should collect the whole of her debt from the insolvent corporation at the expense of the other creditors. Whatever sum she obtains more than her *pro rata* share, reduces by just so much the small pittance, by way of a dividend, going to the other creditors.

The decree of the court below should be reversed, and a decree passed appointing a trustee to sell the property, in pursuance of the prayer of the cross-bill.

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Mr. Justice WYLIE delivered the opinion of the court, in substance as follows:

We think the decree below should be affirmed. It is admitted that Mrs. Darby proposed to pay the debt of her husband to the assignees of the company, provided they would allow her to set off the amount of \$1,752 which stood in her own name and exclusive credit on the books of the company. They refused that offer and insisted upon selling the property embraced in the trust deed to pay the whole of it out of the estate of her husband.

The company is insolvent, and the defendants, who are its assignees, contend that she can only be allowed the dividends upon her deposit, like the other creditors of the institution. She files her bill for an account and to restrain the threatened sale, and claims the right in equity to set off the amount of her said deposit against the sum due upon the promissory note of her husband. On the other hand, the assignees filed a cross-bill to obtain a decree for the sale of the property. The court below enjoined the sale and decreed the assignees to credit her with the whole amount the company owed her separately upon the debt, and that she should pay the balance, or the property should be sold. From this decree they have taken an appeal, and insist with great earnestness that they are entitled to collect all the money due upon the note, and that she is only entitled to the dividend of a general creditor.

The rule in a court of equity, where the wife executes a security for the indebtedness of the husband, is explained to some extent in the case of *Huntington v. Huntington*, 2 Brown's P. C., 110, and is still more fully stated in the American notes to this case in White and Tudor's Leading Cases in Equity, beginning at page 1938, where it is said: "A wife who mortgages her estate for the benefit of her husband is a surety, and as such is entitled to an indemnity from him, and his assets will, if the circumstances admit, be taken in the first instance to satisfy the mortgage." It is also said, in a subsequent part of the same note, that "the equitable principles relating to sureties apply equally to a wife mortgaging her

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estate for her husband's benefit; and it is well settled that a valid agreement between the creditor and husband, by which the time of payment is extended, will, if unauthorized by the wife, discharge her mortgage." The wife in this instance having mortgaged her own property for the debt of her husband, is entitled to the rights that belong to any other surety, and the fact that she did not join in the note cannot deprive her of this privilege. This court has already decided that a debtor to this company at the time of its failure will not be allowed to set off debts which he has subsequently bought up from other parties. The creditors of the institution all stand upon an equal footing, and a party will not be permitted to gain an advantage in that way. But that is not the question here. Mrs. Darby had funds to her credit in the hands of the company at the time of the failure. Her husband is now dead, and the company have advertised the property for sale. We have seen that she occupies the position of a surety on her husband's debt, and the question is, whether, as such surety, she shall be allowed to set off her own claim against the indebtedness of the husband. If the principal was entitled to a credit in the company's books at the time of its failure, he could undoubtedly set it off against his \$2,000 note. The surety is not in a worse condition than the principal in a court of equity. And surely if the principal, upon being sued by the creditor, could claim in equity a set-off, the surety is entitled to the same benefit.

There is a very learned note in 2 Smith's Leading Cases, marginal paging 320, sixth American edition, from which I feel at liberty, in view of the importance of the question, to extract one or two passages. After stating the general doctrine in regard to set-off, the author says:

"It follows from these principles that when a cause of action is transferred by an assignment which passes the legal title, a debt due by the assignor cannot be pleaded as a defense to a suit brought by the assignee, because the mutuality which is essential to a set-off is gone in form, and the court cannot look outside of the record to see whether it ex-

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ists in substance. (*Spencer v. Babcock*, 22 Barb., 326; *Beckwith v. The Union Bank*, 5 Seld., 211.) But the injustice which this rule is calculated to produce has been remedied in some instances by statute, and in others by the judicial introduction of a more equitable principle; and it is now well settled, in general, that when the assignees or personal representatives of a bankrupt or insolvent are plaintiffs or defendants, the right of set-off will extend to all demands that could be proved by or against the estate, without regard to the period when they become due, or the person in whom the right of action is nominally vested. (*Clark v. Hinokins*, 5 R. I., 219; *Aldrich v. Campbell*, 4 Gray, 284; *Fennell v. Nesbit*, 16 B. Monroe, 551; *Morrow v. Bright*, 20 Miss., 298.) Thus, in *Marks v. Baker*, 1 W. C. R., 178, a liability incurred by endorsing the bills of a bankrupt was allowed to be set off against a suit brought by his assignee, on the ground that although it would not have been provable as a debt, it was clearly a case of mutual credit; and a similar view was taken in *Jones v. Robinson*, 26 Bark., 310, of the relation between a bank and one of its depositors, whose acceptance it had discounted. Dealings between an insurance company and its customers have also been held to have a character of mutuality which entitles the latter to set off the amount due for losses, although not yet definitely ascertained or liquidated in a suit brought for premiums by the assignees or receivers who are charged with the task of winding up the affairs of the company. (*Holbrook v. Receiver*, 6 Paige, 220.) For as an assignee in bankruptcy or insolvency is not a purchaser, he will take subject to any equity that could have been made available against the assignor. (*Mess v. Goodman*, 2 Hilton, 275.) In *Tucker v. Oxley*, 5 Cranch, 24, a debt due by a partnership was held to be a defense brought by the assignees of an insolvent member of the firm, there being special circumstances which gave both demands the character of mutual credits. And it is well settled in Massachusetts that unliquidated demands, and demands growing out of a partial failure of consideration, may be set off in an action brought by the

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assignee of an insolvent during his life, or by his executors after his decease."

The doctrine is illustrated in the numerous cases cited, but I will only refer to that of *Aldrich v. Campbell*. The opinion of the court was delivered by Thomas, J., in which he says:

"This case is not to be determined upon the technical rules of set-off, but upon the principles regulating the settlement of insolvent estates, whether of persons living or deceased. The settlements with such estates are final, and all mutual demands are to be balanced; claims not liquidated and debts absolutely due, though payable in future, are to be included. In the case of an insolvent estate of one deceased, all claims existing at the time of the death are to be set off; in the case of an insolvent estate of a person living, all claims existing at the time of the first publication of the notice of the issuing of the warrant. The rules are the same in whatever form the question is to be settled."

And to support these reviews he cites many cases. The same note contains a great variety of decisions showing when a set-off will be allowed and when refused. But it is plain from the authorities already referred to, that if Darby himself had been alive at the time of the failure of the company, with a credit on its books of \$1,750 and owing it \$2,000, the company could only claim the difference between these two sums. His wife, who occupies the position of a surety, has a much stronger equity to set off against the claim the money which she is entitled to as a depositor in the bank. For these reasons a majority of the justices who heard the argument are of opinion that the decree of the court below ought to be affirmed.

MACARTHUR, J., dissenting, said:

That he did not think the claim of Mrs. Darby could be set off in this case, for the reason that the demands were not mutual debts, as that term is understood in a court of equity. It is undoubtedly true, that if Darby, in his life-time, could have claimed to set off the indebtedness to his wife against

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his own note, she would now be entitled to the same benefit. But I suppose it will not be pretended that this set-off would be allowed the husband if he were alive and the assignees were suing him upon his note. How, then, can the wife have a benefit which would be denied the husband? Simply not for the reason that the debts are not mutual, and the wife is therefore in the same plight and condition as her husband. It is said she is a surety. But the liability of the surety arises only upon the default of the principal, and upon satisfying the debt she is entitled to be subrogated to all the securities in the hands of the creditor. Now, what is the case here? The defendants are assignees or trustees of an insolvent corporation. They take its assets just in the condition they were at the time of the failure; and the rights of the creditors of the corporation from that moment become vested, and cannot be impaired by any subsequently acquired claims of other persons. It is true that the debtors do not lose any of their rights of set-off which they had at the time the corporation became insolvent. But the assignees or trustees take the assets subject to this and other existing liens in trust for equal distribution among all the general creditors, and no one can obtain any advantage over them by means of anything that may happen afterwards. This doctrine is fully sustained by the cases cited in the note referred to in 2 Smith's Leading Cases, 6th Am. ed., 320. And this court has decided, with reference to this institution, that a debtor could not set off a claim purchased after notice of the failure of the bank. This is upon the principle that no one can obtain an unfair advantage to the injury of the other creditors. Now, Mrs. Darby acquired her title absolute to the property in question long after the corporation had closed its doors. The note was made by Darby in August, 1872, payable in one year. On June 29, 1874, after the note was overdue, the bank suspended and the trustees took possession of all its books and assets. Afterwards, in March, 1875, Darby died, leaving a will giving all his property to his wife. Before this event the corporation creditors had become entitled

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to an equal distribution of its assets, just as they were in the month of June of the previous year. Among those assets was Darby's note for \$2,000, which had been overdue for nearly a year. When the bank stopped, clearly Darby, who was then alive, could not have availed himself of the offset now claimed; and the whole amount of the note therefore became vested in the trustees for the benefit of the creditors. The subsequently acquired title of Mrs. Darby could not affect this vested interest. At the time she joined in the trust deed, she was only entitled to a life estate in a portion of the property, and I am unable to see how the subsequent death of her husband, leaving a will whereby he devised her all his property, can divest to any extent the equities already acquired by the trustees for the benefit of other creditors. If it be admitted that she is in the situation of a surety in respect of her life estate in a portion of the property, which was the only interest she could convey, it cannot, I think, be pretended that she is also a surety in respect of the land belonging in fee-simple to her husband, or the title to the rest of the property of which he was seized in fee in right of his wife. With reference to these she could acquire no rights of suretyship which could affect the interest of the creditors, for she did not and could not mortgage them. In my judgment she should not, therefore, be permitted to take all the real-estate securities without this incumbrance, simply upon paying the difference between her husband's debt and her own claim.

I have not found a decision which sustains the doctrine that a surety can seize upon all the collateral securities and set off at the same time a personal claim against the indebtedness of the principal. Perhaps it would be indecorous in me to say there are no authorities to that effect, since a fuller examination than I have had an opportunity to bestow might discover that I was in error. But for the reasons stated I am of opinion that the decree below ought to be reversed.

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CATHARINE DICKSON AND CHRISTOPHER DICKSON,
HER HUSBAND, MARY FRAILER, AND MARGARET
FRAILER v. THE BALTIMORE AND POTOMAC RAIL-
ROAD COMPANY.

- I. The Baltimore and Potomac Railroad was authorized by act of Congress May 21, 1872, to lay its track along Sixth street, paying any damage sustained by the owners of property. If the company could not agree with the owner, it was required to cause the damages to be assessed by a jury. This the company neglected to do, and the court decides that the owner can maintain an action on the case for such neglect of the company, and that the plaintiff can recover in such action all the damages resulting to his property.
- II. Whether an action at common law without the statute would lie, *quære*.

STATEMENT OF THE CASE AND DECISION.

The plaintiff avers in his declaration that he is the owner of a certain lot of land and premises on Sixth street southwest and north of Virginia avenue, in the city of Washington, and that the defendant on the 10th of June, 1872, without the assent of the plaintiffs, extended and laid its track from said Virginia avenue along said Sixth street, and by the said land and premises of the plaintiffs, and injured and depreciated the value thereof, and failed and neglected to pay the damages which the property sustained by reason of the laying of the said track; and that the defendant did not cause to be ascertained the said damage in manner and form as prescribed by an act of Congress of May 21, 1872, which authorized the defendant to lay its track along said street upon paying any damage to the owners of the property which they might sustain by reason of the said track; and the said damage was directed to be ascertained in the manner provided for by the act of Congress approved February 5, 1867. The second section of the last act provides that if the company cannot agree with the owners as to the matter of damage, the company may apply to a justice of the peace, who shall issue his warrant to the marshal to summon a jury to value the dam-

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ages which are to be paid to the owner of the property. The declaration concludes by averring that defendant has neglected to pay the said damages, or to have the same ascertained as prescribed by the said acts of Congress, to the plaintiffs' damage four thousand dollars. The defendant demurred to this count, to which there was a joinder, and on March 18, 1878, the demurrer was overruled by the chief justice presiding at the circuit, and an appeal was then taken to the general term.

On behalf of the demurrer it was contended that the fee in the street being in the United States, and not in the property-owners, it is competent for Congress to authorize the street to be used by the railroad company in the construction of its road without compensation to adjoining owners, or to the municipality, and without the consent, and even against the wishes, of either. (2 Dillon on Municipal Corp., sec. 556.) That the right of the property-owner to compensation for depreciation in the value of his property, resulting from the laying of tracks in the street, depends upon the statute, and can only be ascertained and awarded in the manner prescribed by the statute. Even where a railroad company is authorized by the Legislature to enter upon lands of an individual, the acts of the railroad company assume, under the sanction of such law, a legal character. Even in the case of entry upon the lands of an individual, the proceedings of the company being rendered legal by the statute, the common-law remedy based upon their illegality becomes inapplicable, and is by necessary implication taken away. "If an affirmative statute, which is introductive of a new law, direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner." (Dwarris on Statutes, 641.) When the Legislature authorizes the construction of a railroad track across the land of individuals, and damages are supposed to result to their property, and a mode is provided by statute for the assessment and payment of the same, the remedy for the person injured is then confined to the mode provided by the

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statute, and none exists at common law. Plaintiffs, therefore, have sustained no injury from the failure of defendant to institute statutory proceedings. Besides, even if the power and duty of beginning the proceedings had been exclusively devolved on the company, it may well be doubted whether plaintiffs could maintain an action at law for the failure of the company to perform the duty. The remedy would be by mandamus to compel the company to perform that duty.

On the part of the plaintiffs it was contended that the statute puts the initiative upon the company; that it gives the corporation the right to lay their track along the highway, provided they should pay to the owners of adjoining property the damage their property might suffer; that the statute provides a way in which its damages shall be ascertained by the act of 1867, which says the corporation shall cause the assessments to be made; and that, take the statutes altogether, they say that the corporation may lay the track along this street, provided it shall pay the damages to the adjoining property, and if it cannot agree with the owner it shall cause the damages to be assessed, &c. Several authorities were cited by the respective counsel.

The court came unanimously to the conclusion, that although the railroad company, by virtue of the acts of Congress, could lay their tracks along the street in front of plaintiff's lots, yet they were required to agree with the owner in respect of the amount of damages which he might suffer from that use of the street, and in case they were unable to agree with such owner, then they were to cause the same to be assessed by a jury in a particular mode and manner prescribed by the statute, so that the protection to the lot-owner was embraced in the same act which authorized the corporation to lay their railroad tracks for the purpose of passing their trains along Sixth street. This process of adjusting the damages was to originate with the company. In this instance they neither agreed with the owner nor did they take any steps to ascertain the value of the damages by the action of a jury, as contemplated by the law. The court decides that under these

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circumstances the plaintiffs can maintain an action on the case against the railroad company for its neglect in not complying with the statute in this respect, and that the plaintiff is entitled to recover in such action all the damages resulting to his property. The chief justice appeared to think that the lot-owner could sue the company at common law for the injuries resulting to his property from this use of the street; while Justice Wylie expressed the opinion, that without the statute no action would lie. It, however, became unnecessary to determine how far the company would be liable at common law alone, since the action here is for a breach of duty imposed upon the defendant by an act of Congress.

Judgment affirmed.

James G. Payne, for plaintiffs.

Edwin L. Stanton and *A. S. Worthington*, for defendant.

CAPE ANN GRANITE COMPANY v. BLUNT & HIMBER.

AT LAW.—No. 16,965.

- I. An issue of law produced by a joinder in demurrer cannot be heard at the circuit, unless it is regularly placed upon the calendar.
- II. *Knoedler v. Meloy*, 2 MacA., 239, reaffirmed.

STATEMENT OF THE CASE AND DECISION.

Assumpsit upon the common counts only, with the particulars of demand attached for 2,700 granite paving blocks, at \$40 per thousand, \$110.40.

The defendant filed three pleas: first, that plaintiff is not a body corporate; second, that defendants have paid the amount due for said granite blocks erroneously charged to them in said particulars of demand, and that such payment was made in satisfaction of a judgment of condemnation against defendants in another action at law in this court, and prior to the

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institution of this suit; third, that the defendants are not indebted as alleged.

The plaintiff joined issue on defendants' first and third pleas, and to the second plea filed a demurrer, on the ground that it was bad in substance; and gave notice that the matters intended to be argued were, that it is a plea in avoidance and is bad as wanting color, and that it is double. On March 26, 1877, the defendants joined issue on the plaintiff's demurrer. The plaintiff then gave a five days' notice to defendants' attorney that the demurrer would be heard on any motion day, according to rule 47, which provides that "demurrers may be heard on any motion day after five days' notice." The cause was not placed upon the calendar.

It appears that when the demurrer was called up for hearing, the case of *Knoedler v. Meloy*, 2 MacA., 239, was brought to the attention of the court, and thereupon the cause was certified to the general term to be heard in the first instance.

The chief justice, who presided on that occasion, was desirous that the point of practice involved should be again considered at the general term, as it was supposed to have an important bearing upon the dispatch of business at the circuit. But upon re-examining the question, the court in banc came to the conclusion that the law was properly construed in the former decision. In the case referred to, it was decided that a joinder in demurrer produces an issue of law, and the practice in regard to noticing it for trial, and entering it upon the calendar, is the same as in cases in which there is an issue of fact; and it was declared further that the rule of court which prescribes that "demurrers may be heard on any motion day after five days' notice," was inoperative and void as contravening the statute.

The court announce that, in their opinion, the decision in *Knoedler v. Meloy* was correct, and that they adhere to the ruling in that case, and the cause is remanded to be proceeded with accordingly.

CARTTER, Ch. J., dissented.

O. D. Barrett, for plaintiff.

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BOND, BROTHER & CO. v. ALEXANDER R. SHEPHERD.

AT LAW.—Nos. 18,026 AND 18,418.

In an affidavit filed by plaintiff in an action against an endorser of a promissory note, under rule 73, he must set out a statement of the facts necessary to show defendant's liability as endorser; such as that payment had been demanded of the maker, and that notice thereof had been given to defendant.

STATEMENT OF THE CASE.

The seventy-third general rule of the court provides that in any action arising *ex contractu*, if the plaintiff or his agent shall have filed at the time of bringing his action an affidavit setting out distinctly his cause of action and the sum he claims to be due, exclusive of all set-offs and just grounds of defense, and shall have served the defendant with copies of his declaration and of said affidavit, he shall be entitled to a judgment for the amount so claimed, with interest and costs, unless the defendant shall file along with his plea an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim, and especially stating also in precise and distinct terms the grounds of the defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part.

The action is brought in each case to recover the amount of a promissory note from the defendant as endorser thereon, and there was filed with the declaration an affidavit of the plaintiff John R. Bond, which reads as follows:

"That the amount of said note, to wit, one thousand dollars, with interest at nine per cent. from September 14, 1876, is due from the defendant, the endorser thereof, to the plaintiffs, exclusive of all set-offs and just grounds of defense; that no part of said note has been paid, and no interest thereon has been paid by the defendant or by the maker of said note."

The defendant filed three pleas: first, *non assumpsit*; second,

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that he did not endorse the note; third, that he did not receive notice of dishonor.

These pleas were not supported by affidavit.

The court below gave judgment in each case for want of affidavit of defense, from which judgments the defendant appealed to this court.

Appleby & Edmonston, for plaintiffs.

William F. Mattingly, for defendant.

The plaintiff, under the law and rule of court, before he can require a defendant to disclose his defense under oath, and deprive him of his constitutional right of trial by jury, must himself present to the court at the time when suit is brought a *prima-facie* case in law entitling him to judgment manifested by his affidavit.

The plaintiff's affidavits in these cases do not make out such a case. They do not show that payment was demanded of the maker, or that any notice of dishonor was given to the defendant. The affidavit is such that any holder of a promissory note could make in a suit against an endorser where confessedly there was no demand and notice of non-payment.

The protest filed with the note in number 18,026 does not show on its face that any notice of dishonor was given. It does show that *no demand* was made of the maker, or that any inquiry was made to ascertain his residence or place of business. In number 18,418 the original protest was not filed, but merely what purports to be a copy. It also shows that no demand was made of the maker, and does not show any legal excuse for the want of such demand. The plaintiff's affidavit shows that the defendant was merely an accommodation endorser. As such, he has the right to insist that before judgment is entered against him in the face of his pleas, without a trial by jury, every obligation imposed by law upon the plaintiff to hold an endorser liable to judgment has been complied with, and is presented to the court under the obligation of an oath.

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CARTTER, Ch. J., delivered the opinion of the court, substantially as follows:

The point raised in this case presents an interesting question under our rules of practice. A judgment was allowed upon an application to the court below because the defendant did not file along with his pleas an affidavit setting forth the grounds of his defense. The actions were brought upon promissory notes, and were therefore within the meaning of the seventy-third rule. At the time of bringing his actions the plaintiff had filed an affidavit in each case setting out his cause of action. The precise point presented is, whether it was sufficient to entitle him to the judgment in question. Under the rule the cause of action must be distinctly set out in the affidavit either by the plaintiff or his agent. This of course requires a statement of the facts necessary to show defendant's liability. In these cases the actions are against the defendant as an endorser of a promissory note, and the affidavit does not state that payment had been demanded of the maker and notice thereof given to the endorser; nor is there any excuse alleged why these formalities were dispensed with. The law is clear that a demand on the maker is necessary in order to fix the liability of the endorser, and so essential is this to the cause of action in such case that it must be alleged and proved before the plaintiff can recover. There is an allegation to this effect in the declarations, but the affidavits do not purport to verify them. Now, the court are of opinion that if the plaintiff would avail himself of the rule, and deprive the defendant of a trial by jury, he must distinctly show the facts upon which the defendant is to be liable as endorser, and he ought to state them explicitly and with such certainty as to show the particular cause of action upon which he relies. The affidavit does not state a cause of action against the defendant as endorser, and is, therefore, insufficient to entitle him to a judgment by default. The defendant was not called upon to swear to his defense. The judgments are reversed and the cases remanded for trial.

OLIN, J., dissented.

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HENRY HOILES AND LAFAYETTE ALLISON v. THE UNITED STATES.

CERTIORARI.—No. 12,517.

- I. When the return to a *certiorari* showed upon the face of the record that there was sufficient to warrant the conviction in the Police Court, the writ will be quashed. It may, however, be used in aid of a *habeas corpus*.
- II. Where a larceny consists of a single act, and the goods stolen belong to different persons, it is unnecessary that there should be separate informations or indictments. In such case there can only be one conviction and sentence.
- III. An information or indictment charging the stealing of goods of different persons at the same time, in one count, would not be bad for duplicity, provided the ownership of the goods is specifically set forth. But where there are several counts or separate informations, there can be but one conviction and sentence.

A. G. Riddle, for petitioners.

H. H. Wells, for the United States.

Mr. Justice MACARTHUR stated the case and delivered the opinion of the court:

This is a writ of *certiorari* to the Police Court. The petitioners for the writ set forth that they are detained and imprisoned in the jail of the District of Columbia under color of a pretended judgment and sentence of the Police Court of said District. They also allege that on October 25, 1877, they were convicted in said last-named court on three several informations charging them with three several larcenies, and sentenced to imprisonment for a period of one hundred and eighty days each on each of said informations. They then aver that all of said larcenies were one act, done and committed at one place and one time; that the property alleged to have been stolen was the property of three several persons, but was altogether in one room and all taken by the same act; that said larceny was illegally severed into three, by means whereof the petitioners were subjected to three times

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as much imprisonment as the law awards for the alleged crime. They represent that they have now suffered the full term of one hundred and eighty days' imprisonment, the period beyond which they cannot be detained.

The return to the writ consists of the informations and the convictions, but there is nothing on the face of this record to show that the goods stolen were all taken at the same time, or in a single transaction. The larceny is charged in each of the informations as if it had been a separate larceny, and nothing appears to contradict this view, unless it is the fact that each information charges the goods to have been stolen on the same day. We do not think that this circumstance alone is sufficient to show that the Police Court exceeded the limits of its jurisdiction. We are, therefore, of opinion that the writ must be quashed. The matter set forth in the petition can more properly be examined on a writ of *habeas corpus*. The return of the officer can be controverted in that proceeding, and the petitioners will have the right to introduce such other facts and circumstances as may be material to their case. (R. S., sec. 760.) We think this is not the practice in a case of *certiorari*, where the question is to be decided upon the record alone, without the right of denying any of the facts it contains. This writ, however, might be used in aid of a *habeas corpus*, and then the record and circumstances could be brought fully before the court for its decision. The principle of law in the case was, however, discussed at large on the argument, and it has been suggested that an expression of opinion would be advisable with a view to the future practice. To meet this expectation we have carefully considered the question, and are prepared to decide it.

All the judges who heard the argument are of opinion that where the larceny consists of a single act, and the stolen goods belong to different persons, it is unnecessary that there should be separate informations or indictments, and that in such case there can only be a single conviction and sentence. It is a rule of criminal pleading, that where several articles of property are stolen at the same time and place, the steal-

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ing constitutes but one offense and should be so charged in the indictment or information. It is regarded as a single act and the result of one intention. I do not believe it is necessary to cite any authority in support of this familiar principle. Where the articles are stolen at different times, they are different acts of larceny, and may be charged as different offenses. "But it seems that if the property of several persons, lying together in one bundle, or chest, upon the same table, *or even in the same house*, be stolen together at one time, the value of the whole may be put together, for such stealing is one entire felony." (2 Russell, 177.)

And to the same effect is 1 Hale P. C., 531, where the author gives this illustration: "But it seems to me that if, at the same time, he steals goods of A to the value of sixpence, goods of B to the value of sixpence, and goods of C to the value of sixpence, being, perchance, in one bundle, or upon a table, *or in one shop*, this is grand larceny, because it is one entire felony, done at the same time, though the persons had several properties; and, therefore, in one indictment they make grand larceny." (See, also, 3 Chitty Cr. L., 959, in the note.) Now, if the petition in this case truly avers that the larcenies set up in the three several informations were of goods stolen at the same time, and by the same act, and at the same place, although of different owners, then, according to this authority, such stealing is one entire larceny, and may therefore be embraced in the same information for the purpose of making a case of grand larceny and increasing the punishment. It appears from the certified copies of the informations that each charges only petit larceny, and the combined value of the goods alleged to have been stolen is not sufficient to make a case of grand larceny under our penal code. For a single act of petit larceny the defendants may be imprisoned at most for a period of six months, but because there were three several owners of the property they have been tried and punished three times for the same criminal act, and have been sentenced to imprisonment a whole year beyond the period prescribed by authority of law. We

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cannot sanction this practice. We are referred to *United States v. Beerman*, 5 Cranch C. C. R., 412, where a majority of the late Circuit Court decide that if the goods of several persons are stolen at the same time, the stealing of each person's goods constitutes a distinct offense, and may be the subject of a distinct and separate indictment. Chief Justice Cranch delivered the opinion of the court, and it was relied upon as showing the practice which has always prevailed in this District. I have carefully read the remarks of the learned chief justice. The authorities which he cites, refer to cases of burglary, or are in regard to the construction of ancient English statutes. He also states that he had examined down to that time every case of larceny in the then county of Washington, and found only ten indictments charging in one count stealing the goods of several persons at the same time. There is a vigorous and earnest dissent by one of the three judges. We are unable to recognize that judgment as law, for it authorizes in the practice of this court the doctrine that for one offense a prisoner may be tried and punished three times, or as many times as there are distinct owners of goods stolen at the same time. To divide one larceny into several because there were several owners of the property, is contrary to the constitutional guaranty and the spirit of the common law; and if the statements in the petition are true, two of the convictions were wrong, and the prisoners should be discharged upon the expiration of the sentence on the first information.

An objection was urged that an information or indictment charging the stealing of the goods of different persons at the same time would be bad for duplicity. No objection of that kind would be available within the rule here laid down, provided the value and owner of each article were specifically set forth. (*State v. Menill*, 44 N. H., 524; *State v. Daniels*, 32 Miss., 558.) But where the indictment contains several counts, each stating a different owner for distinct portions of the goods taken at the same time, or where, as in this case, there are different informations, each containing an averment

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of ownership for distinct parcels of the goods, there can be but one judgment and one term of imprisonment.

But for the reasons already stated, the writ may be quashed without prejudice to the right of the petitioners suing out a *habeas corpus*.

CHARLES A. MAXWELL EX REL. v. JOHN A. J. CRESWELL, ROBERT PURVIS, AND ROBERT H. T. LEIPOLD, COMMISSIONERS OF THE FREEDMAN'S SAVINGS AND TRUST COMPANY.

AT LAW.—No. 18,073.

A motion to quash a writ of *certiorari* is not a non-enumerated motion within the meaning of section 800 of the Revised Statutes of the District of Columbia, and it may be heard by any of the justices of the court at chambers. Rule 19 is not in violation of that statute.

STATEMENT OF THE CASE.

A *certiorari* was issued to a justice of the peace under the following circumstances:

The petitioner represents that on the 4th day of April, 1877, he rented certain premises from Albert Grant, situated in this city, and that he holds possession of said premises as tenant of said Grant; that on the 10th of July the defendants commenced proceedings before Charles Walter, a justice of the peace for the District of Columbia, under the landlord and tenant act, against the petitioner, for unlawfully detaining the premises in question from the defendants after his estate had been determined by a lawful notice to quit.

The petitioner further represents that he derived his estate in said premises from said Grant alone. He denies the notice to quit, and alleges that none of the defendants ever had any possession or occupation of the premises, or any rights therein. In conclusion, he claims that there is a want of jurisdiction in the justice, and prays that a writ of *certiorari* may issue.

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'The allowance of the writ was endorsed upon the petition for the *certiorari* as follows: "July 17, 1877, at chambers. Let the writ issue as prayed.—D. C. HUMPHREYS, *Justice*."

The writ then issued and the justice made his return, consisting of the papers in the case. The defendants filed a motion July 19, 1877, to quash the writ and to have the proceedings remanded back to the justice. The following notice of this motion was served upon the attorney for the petitioner:

"Take notice that on Monday, the 30th day of July, A. D. 1877, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, a motion will be made in this court, holding a special term, to dismiss the *certiorari* heretofore issued in this cause, and to remand the proceedings back to the justice to be proceeded with according to law.

ENOCH TOTTEN,
Attorney for Plaintiffs.

To WM. A. MELOY, Esq.,
Counsel for Maxwell."

On the return day of the notice the motion was heard, and an order made on the 30th of July, at chambers, quashing the writ of *certiorari* and returning the papers to the justice, that the cause might be proceeded with according to law. From this order Maxwell took this appeal.

The other facts appear in the opinion of the court.

William A. Meloy, for petitioner.

I. The writ of *certiorari* in this case was duly granted by and in the Circuit Court, held by Associate Justice Humphreys, who continued to hold that court until August 10, 1877. The petition showed that Maxwell claimed to be a *stranger* to *Creswell et al.*, and to be *tenant* to one Albert Grant; and so, instead of moving in circuit term to quash this common-law writ, the respondents gave notice and made their motion in the equity special term, held by Mr. Associate Justice Wylie.

The order thereupon made *ex parte* by Judge Wylie, and which appears to have been filed August 6, 1877, should be wholly set aside, and the case remanded to the Circuit Court

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for further proceedings therein, according to the right of the matter and the practice of the court.

The order was in fact made by the Equity Court in special term, pursuant to the notice, and therefore was a usurpation of common-law business, unwarranted by the law and the rules of the court, and a flagrant violation of the rule of January 12, 1867.

The cause never has been presented on behalf of the appellant, either in the equity special term, for there he refused, and rightly refused, to appear at all; and to appear at chambers he never was notified.

II. The motion to quash a writ of *certiorari* is a non-enumerated motion, and must "first be heard and determined at special term," not at chambers. (Rev. Stats. of D. C., sec. 800.)

Section 19 of General Rules is, to this extent, *ultra vires*.

Enoch Totten, for defendants.

Mr. Justice WYLIE delivered the opinion of the court:

This was a proceeding before a magistrate under the landlord and tenant law to get possession of property, and an application was made by the party in possession for a *certiorari* to remove the proceedings before the magistrate into this court. The writ was allowed, as appears by endorsement thereon at chambers. Afterward, the magistrate having sent up the record, a rule was taken upon the petitioner in the proceedings to show cause at the special term why the *certiorari* should not be quashed. The case came before me under that notice, and I was of opinion that the court, sitting in equity, had no jurisdiction to pass upon the case, but that it might be heard before me as at chambers. Counsel on both sides were heard in that way, and the writ of *certiorari* was quashed.

At that time no technical objection seems to have been made as to the right of the judge at chambers to decide such a case. But an appeal has been taken from that order; and

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this point having been argued here, we will now dispose of it.

Under the nineteenth general rule, "motions or applications for special remedial writs, such as writs of *quo warranto*, *mandamus*, *certiorari*, *supersedeas*, &c., shall be heard by the Circuit or Criminal Court, or before one of the justices at chambers, or in special term; but not until a petition, verified by affidavit and stating the grounds of the application, has been filed and docketed. But the justice to whom the application is made may order it to be heard in the general term in the first instance. Motions to quash, set aside, or dissolve any of said writs may be heard in the same manner;" that is, before either of these courts, or before the judge at chambers.

It was contended that this rule violates the provision of the organic law which declares that all non-enumerated motions in a case shall be heard in court after notice. If this motion to quash a *certiorari* be one of these non-enumerated motions, and the cause pending in court, our rule would violate that provision of the statute. But we are not of that opinion. The statute applies to actions or suits between man and man pending in court. Now, the *certiorari* is not one of those suits referred to in the statute; and upon this subject I will read one or two extracts from the Maryland law, as laid down in Evans's Practice, beginning at page 383, chapter 15 of prerogative writs:

"Our attention has hitherto been occupied in considering the course of proceedings in actions between man and man. But a work on the practice of the common law would be defective if it did not include something beyond this. Actions are the ordinary proceedings by which redress is sought in the case of ordinary injuries. But there are some extraordinary cases in which persons having or claiming some degree of public authority attempt to extend or abuse it to the injury of their fellow-citizens. In such cases, if the party were left to his remedy by action, the redress he could obtain would be frequently very insufficient. The law, therefore, inter-

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poses during the transaction to prevent or put a stop to the unlawful proceeding. Several remedies of this nature have been invented, which have received the generic name of prerogative writs, probably because they were all issued only by those higher courts which were more emphatically the king's, and were considered as in some degree the exercise of a beneficial and useful prerogative of the crown. Of these writs, three still remain in familiar use among us: *certiorari*, *habeas corpus*, and *mandamus*."

And then, after treating the history of the subject pretty much at large, at page 386, this work proceeds: "If the *certiorari* be to remove proceedings by justices of the peace, under the act of 1793, chapter 43, entitled 'An act to provide a summary mode of recovering the possession of lands and tenements, holden by the tenants for years, or at will after the expiration of their terms, or if it be in case of an inquest for a forcible entry and detainer, or a forcible entry, the writ cannot issue until a bond has been given.' 'The party obtaining such writ of *certiorari* shall give bond, with security, to the opposed party, to be approved by the judge or court allowing such writ, in such penalty as such judge or court shall direct, conditioned for the payment of all costs and damages that may be incurred or suffered by the delay of the proceedings, if the matters in controversy upon such writ shall be decided against the person obtaining the same.'"

Now, though the act of 1793 has been superseded by our act of Congress on the subject, yet in regard to the process of *certiorari* I think there has been no change.

Then, at page 387, the author says: "The petition, affidavit, and bond being prepared, application must be made to one of the judges of the court, who, either in or out of court, may, in his discretion, approve the bond and order the clerk to issue the *certiorari*."

So that this writ can be issued either by the judge in court or the judge out of court; and as it is one of this class of writs not properly between man and man, but between the government, as it were, on the one side, and the party on the other

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side, it is a prerogative removal of the proceeding; and if a judge have power to issue a writ, he ought to have power to quash it. If the point contended for be correct, then a mandamus or the writ of *habeas corpus* would be liable to the same objection. The mandamus having issued and being made returnable before the judge, he could not quash it, and so as to the *habeas corpus*. For these considerations we think that the rule of the court is not inconsistent with the provisions of the organic law.

The court affirms the judgment below.

JOHN GEORGE KILLIAN, ADMINISTRATOR DE BONIS
NON OF WILLIAM SCHLORB, DECEASED, MARY MARGARET SCHLORB, EMMA SCHLORB, WEBELMINA SCHLORB, KATE SCHLORB, GEORGE L. SCHLORB,
AND JOHN SCHLORB, v. WILLIAM E. CLARK.

EQUITY.—No. 5322.

- I. Where a person conveys real estate in trust for the use of his wife, at a time when he is engaged in a prosperous business and is perfectly solvent, the law will not presume that he intended to hinder and delay a creditor whose debt was created several years after the conveyances were made. Fraud in such case is to be established by proof, and not by presumption.
- II. If, however, a voluntary settlement is made at or about the time the debt is contracted, a court of equity will set it aside at the instance of the creditors.
- III. A bill of review may be filed under a general rule of court announced in connection with this case, at any time within two years from the date of the decree sought to be reviewed.

STATEMENT OF THE CASE.

This is a bill of review to reverse two decrees in the original cause on the ground of error apparent on the face of the record.

The bill of review sets out fully the pleadings and proceedings in the original cause, together with the decrees and the

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alleged errors therein. From the record the material facts appear to be as follows:

On the 18th of August, 1858, William Schlorb executed a deed conveying lots 6 and 9 in square 654, together with the goods and chattels in the building standing on said lots, to John Killian, since deceased, in trust for the use of his wife, the said Mary Margaret Schlorb, and in case of his surviving her, the said trustee was to hold said property for the benefit of said William Schlorb. On the 23d of October, 1858, the said William Schlorb purchased lots 5 and 8 in the same square from one John B. Kibby, and directed the same to be conveyed to said Killian, upon a similar trust, for the benefit of his said wife. On the 5th day of October, 1865, the said William Schlorb purchased of one Henry J. Baker lot 2 in said square, and had the same conveyed to his infant son, George L. Schlorb; and on the 21st day of December he purchased lot 3 in said square from Thomas B. Brown, and on the 3d day of May, 1866, he purchased from one Amos P. Beedle the north half of lot 7 in said square. The two last-mentioned lots were conveyed to Killian upon the same trust as those already mentioned. On December 28, 1868, he conveyed lot 1 in said square, with certain goods and chattels described in a schedule thereto annexed, to said Killian, also on a similar trust, for the benefit of his said wife. The complainants in the original bill allege that the consideration for all these conveyances, extending from 1858 to 1868, was paid by the said William Schlorb, and the deeds taken to the said Killian and his son for the purpose of hindering and delaying creditors.

In the latter part of November, 1865, the said William Schlorb commenced dealing with William E. Clark, and on the 26th of June, 1873, a judgment was rendered in favor of said Clark for \$3,819.02 against John Killian, administrator of said William Schlorb, who had previously died, upon which an execution had been issued and returned *nulla bona*.

The said Clark thereupon filed his creditor's bill against the parties now complainants in the bill of review, and asked

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that the several deeds already mentioned be declared null and void, so far as his interests were concerned, and that a trustee be appointed to sell, &c.

The answer of Mrs. Schlorb in said original equity suit denied all fraud, and, on the contrary, charged the fact to be that the greater portion of the property was transferred eight years before any dealings took place between the said William Schlorb and the said Clark, and at a time when the said Schlorb was free from debt and engaged in a prosperous business, and the only lot conveyed in trust for the benefit of his wife, after the dealings commenced, was the one transferred in 1868, and that no balance at that time was due said Clark; that the indebtedness arose subsequent to said transfer and shortly before the death of said Schlorb. In regard to lot 2, it is alleged that the transaction occurred a year before the said dealings commenced, and that Clark could not, therefore, have trusted the said William Schlorb on account of said lot, as his name was not on the land records; that in regard to all the property which had been transferred to a trustee for the use of Mrs. Schlorb, no credit could have been given to said Schlorb, as the transaction took place many years before any dealings between said Clark and Schlorb, and could, therefore, in no way have contributed to the indebtedness set up in the bill of complaint. The allegations of fraud are repeatedly denied, and it is averred that Clark is the only person to whom the said Schlorb was indebted. Guardians *ad litem* were appointed for the minors, and the usual answer was put in for them.

John Killian, the trustee, is dead, and the complainant John George Killian is administrator *de bonis non*.

Replications were filed to the answers in said equity suit, but no witnesses were examined. Two decrees were pronounced by the court, one dated February 17, 1875, setting aside the conveyances of lots 1 and 3 and the north part of lot 7 to John Killian, in trust as aforesaid. The proceeds of the sale of these lots being insufficient to pay the judgment of the said Clark, the court decreed on June 13, 1875, that

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all the conveyances of the other lots to Killian for the use of Mrs. Schlorb, and the conveyance to George L. Schlorb, be set aside and the premises sold, and the proceeds thereof applied to the satisfaction of said judgment.

The bill of review assigns various errors in connection with the first of these decrees, to wit, that of February 17, 1875; that at the time of the conveyances of said lots 2 and 3 and the north part of lot 7, no balance could have been found against Schlorb in favor of Clark; that Clark could not have based his transactions with Schlorb on the ground that he was the owner of said lots, because Schlorb was engaged at that time in a prosperous and remunerative business, and such conveyances were made as a reasonable provision for his wife and children; that it is shown by the record of the action at law, which is made an exhibit to the original bill, that during a period of two years and eleven months just previous to the death of said Schlorb, the business transactions between him and the said Clark amounted to \$99,502.83, which had all been paid, over and above the amount of said judgment.

The third and fourth assignments of error in regard to the second decree, dated June 18, 1875, read as follows:

“3d. It is shown by the answers that said conveyances of said lots were not made with any fraudulent intent whatever.

“4th. It is shown by the said bill of complaint of said defendant, William E. Clark, that said lots 2, 5, 6, 8, and 9 were conveyed to said John Killian, as trustee, for the benefit of said co-complainants, Mary Margaret Schlorb and said George L. Schlorb, previous to any transactions between said William Schlorb and said William E. Clark; and that said lots 5, 6, 8, and 9 were conveyed to said John Killian, as trustee, in the year A. D. 1858, and that the business transactions between said defendant Clark and said William Schlorb did not commence until the 22d day of November, 1865, there being a period of nearly eight (8) years between the date of said conveyance of said lots and the recording of the same in the land records of the District of Columbia,

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before the date of any business transactions between said William E. Clark and said William Schlorb."

There are several other alleged errors assigned upon said decrees which are not material to the decision pronounced in the case, unless, perhaps, that one shown by the answers in said equity cause, that Schlorb had no creditors at the time of the conveyances for the benefit of his wife.

The bill of review alleges that the trustee appointed by the court to sell said property has conveyed all of said lots except one to said Clark, and the prayer of the bill is that all the conveyances to the said Clark may be declared null and void, and the said decrees reversed and set aside. The cause was heard below upon a demurrer to the bill of review, and a decree entered April 12, 1877, sustaining said demurrer and dismissing the bill. Hence this appeal.

William J. Miller, for complainant in bill of review.

It is shown by the bill that Clark commenced to deal with William Schlorb on 22d November, 1865; that Schlorb being indebted to Clark, he, on 26th June, 1873, obtained judgment for \$3,819.25; that during the period of two years and eleven months there were dealings between said Clark and Schlorb of \$99,502.83, and that Schlorb paid Clark \$95,683.58.

It is shown that lots 5, 6, 8, and 9 were conveyed to Killian, &c., in trust for Mrs. Schlorb and her children, with certain powers of selling, mortgaging, &c.; were made and recorded in August and October, 1858, at least seven years prior to any transactions between Clark and William Schlorb.

It appears that lot number 2 was never in William Schlorb, and it was conveyed on 5th October, 1865, to George L. Schlorb, son of William, by Henry J. Baker, at least eight weeks before any transaction between Schlorb and Clark. Hence Clark could not have credited Schlorb on the faith of this property. The same may be said as to lots 1, 3, and part of 7.

It does not appear in Clark's bill that Clark, or any other person, was creditor of William Schlorb between the years

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1858 and 1868. Nor is it alleged in Clark's bill that William Schlorb was indebted to any one at the time of the date and recording of the conveyances to Killian and his heirs and assigns in trust.

Nor does Clark allege or attempt to prove that William Schlorb was indebted to him (Clark) at the date of the conveyances; but, on the contrary, Clark shows that lots 5, 6, 8, and 9 were conveyed to Killian at least seven years before even he commenced to deal with Schlorb, and lot 2 at least eight weeks before any dealings between them, and that none of the lots mentioned in Clark's bill were ever in Schlorb's name from 1858.

True, Clark makes a general allegation in his bill that the several transfers of property were done with the purpose and design to hinder, delay, and defraud creditors, and that said transfers were fraudulent and void as to him and other creditors of said Schlorb.

Mrs. Schlorb denies in her answer the allegations of fraud, and says her deceased husband, William Schlorb, transferred a greater portion of the property in 1858, about eight years before any dealings with Clark, and that at the time of such transfers her husband was free from debt, in comfortable circumstances, and in a prosperous business.

It is a well-settled rule, that when a subsequent creditor depends upon the existence of prior debts to vacate deeds on the ground of fraud, he must allege and prove such debts. (*Lust v. Wilkinson*, 5 Vesey, 387; *Holloway v. Millard*, 1 Madd., 229; *Kidney v. Coussmaker*, 12 Vesey, 155.)

There is no allegation of that kind, and no proof of any indebtedness at the time of conveyance. Subsequent indebtedness is not sufficient to make a transfer fraudulent. (*Lyman v. Cessford*, 14 Ia., 229; *Snyder v. Christ*, 39 Pa., 499.)

The mere fact of indebtedness to a small amount, the grantor being in prosperous circumstances, and the gift reasonable provision for a child, will not render the deed fraudulent. (*Hine's Lessees v. Longworth*, 11 Wheat., 199; *Sexton v. Wheaton*, 8 Wheat., 229.)

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There must be, at the time of such conveyance, a fraudulent intent, and it must be clearly shown, or that an indebtedness existed at the time. (*Worthington v. Shiply*, 5 Gill., 449; *Atkinson v. Phillips*, 1 Md. Ch., 507; *Hamilton v. Greenwood*, 1 Bay., 173; *Seaton v. Wheaton*, 8 Wheat., 229.)

It is claimed that a transfer of all the property a man has is a badge of fraud. This will not apply where there are several distinct transfers not so closely connected as to constitute one transaction. (*Preston v. Gaffin*, 1 Conn., 393; *Scott v. Winship*, 20 Geo., 429.)

Again, registration of the deeds was notice to Clark; he could not have been deceived. (4 Stat. at Large, p. 520; *Seaton v. Wheaton*, 8 Wheat., 229; Bump on Fraud. Con., 161; *Sinler v. Turner*, 10 Iowa, 517; *Stewart v. Thomas*, 35 Mo., 202; *Bar v. Hatch*, 3 Ohio, 527; *Smith v. Lowell*, 6 N. H., 67.)

Francis Miller, for defendant.

The right of a man to make provision for his wife proportioned to his means is not here contested, but it is denied that a conveyance to her or to her use of all he ever owned is a proper provision, and if such conveyance is not fraudulent in fact it will be *conclusively* presumed to be fraudulent in law.

It is submitted that such conveyances are fraudulent as to a subsequent creditor, and in support of this view we refer to the following authorities: *Fitzer v. Fitzer*, 2 Atk., 513*; *Beard v. Beard*, 3 Id., 72*; *Stilman v. Ashdown*, 2 Id., 481*; *Glenn v. Randall*, 2 Md. Ch., 222; *Brinton v. Hook*, 3 Id., 480; Kerr on Fraud, 199, 208, 385; 1 Story Eq. Jur., secs. 350, 352-7, 361, 363, 364, 369; *Hinde's Lessee v. Longworth*, 11 Wheat., 199; 1 Fonblanque's Eq., bk. 1, ch. 4, secs. 12, 8, note a, cited in 1 Story Eq. Jur., sec. 362, note 1; *Solomon v. Bennett*, 1 Conn., 525, cited in Willard's Eq. Jur., 236; *Sexton v. Wheaton*, 8 Wheat., 246-7; *Cutheart v. Robinson*, 5 Pet., 280; 2 Story Eq. Jur., sec. 1374; *Planck v. Schermerhorn*, 3 Barb.

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Ch., 644; *Case v. Phelps*, 39 N. Y., 164; *Savage v. Murphy*, 34 N. Y., 588.

All the circumstances connected with these conveyances give proof of their fraudulent character. In the conveyance of lots 6 and 9 in square 654, and all his personal property in 1858, it is provided that if the said William Schlorb survived his wife, "the trustee is to hold the said trust property to and for the use and benefit of said William during the time of his natural life."

"Lot number 1 is to be free from all liability for the debts of said William, and free from his control or *that of any of his creditors.*"

And in all the deeds careful provision is made to protect all of the property, personal and real, from the demands of Schlorb's creditors. The reservation of a reversionary interest in the deed of lots 6 and 9 would of itself be so plain a badge of fraud, that any creditor would have had a right to set that aside if necessary to the payment of his debt.

CARTER, Ch. J., delivered the opinion of the court orally, to the following effect:

This is a bill of review seeking to reverse the decree in equity suit number 3877 for errors apparent on the face of the record. The object of the bill in that cause was to set aside certain conveyances of real estate alleged to have been made in fraud of creditors. The conveyances were chiefly made by William Schlorb to a trustee for the use and benefit of his wife. Whether there was error in the decrees depends upon the validity of these settlements. We are convinced from the record in said equity suit that the gift of the real estate, in 1858, was made during marriage, and that Mr. Schlorb was then engaged in a prosperous business; that he was in good credit and perfectly solvent, and that he was not indebted in any sum or sums to any one. It is furthermore apparent that the first of these conveyances for the use of his wife was made at least eight years, and the second six

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years, and the third thirty days or two months before he had any business transactions with Clark, or any debts were created between them. After the lapse of all that time the dealings between these parties commenced, and in the space of two years they amounted, in the aggregate, to nearly \$100,000. This had all been settled and paid for with the exception of the indebtedness for which the judgment was recovered; and we cannot doubt that that amount would have been paid had Mr. Schlorb not died. There is not a suspicion of fraud to be derived from these circumstances, and, indeed, they repel any such inference. With regard to the antecedent conveyances, Clark was a subsequent creditor, and the law will not presume them to have been made for the purpose of defrauding him. Fraud is a fact in such a case to be established by proof, and not by presumption. Any intention of the kind is denied in the answers filed in and responsive to the bill in the equity cause, and we will not presume what the record fails to establish it. It is, however, possible that the business credit Mr. Schlorb received from Clark might have been inspired by the apparent ownership of the property acquired during the period or about the time during which these dealings were conducted. We have, therefore, come to the conclusion to affirm the first decree of February 17, 1875, ordering the sale of lots 1 and 3 and half of lot 7, and to review and reverse the decree of June 18, 1875, which decrees the sale of the property which had been acquired by said Schlorb previously to any dealings with Clark. The decree is, therefore, reversed, the demurrer overruled, and the proceedings hereafter will be controlled by these views.

It was objected to this bill that it was filed after the period for relief had expired. It was contended that a bill of review ought to be filed within the time for taking an appeal from the special to the general term. Our practice has allowed a longer period than that prescribed for taking an appeal. For the purpose, however, of settling the practice on this subject, we have entered a general rule that a bill of review may be filed at any time within two years from the date of the de-

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cree sought to be reviewed. The practice will, therefore, be regulated hereafter by an established rule of court.

**JOHN VAN RISWICK v. RICHARD L. WALLACH, CHARLES
N. WALLACH, AND JAMES M. C. WALLACH.**

CROSS-BILL IN EQUITY.—No. 2990.

If a creditor take a conveyance of real estate containing covenants of warranty in payment of his indebtedness, and should the title to the land turn out to be defective, his only remedy is upon the covenants in the deed.

STATEMENT OF THE CASE.

The Supreme Court of the United States decided in 2 Otto, 202, that no estate or interest remained in Charles L. Wallach after the confiscation sale of the premises in controversy, and that consequently his conveyance of the same, dated February 3, 1866, to defendant John Van Riswick, after such confiscation, was of no force or effect, and constituted no defense to the right of the complainants to redeem the premises. The said Van Riswick then answered the original bill of complaint, and at the same time, by leave of the court, filed his cross-bill, representing that in addition to the amount due him upon the note and deed of trust which the original bill seeks to redeem, the said Charles S. Wallach was indebted to him, the said Van Riswick, at the time of his death, in the sum of \$12,000; that an account of said indebtedness was stated between them after the return of said Charles S. Wallach to the District; that the said deed of February 3, 1866, which also included the western part of lot 14 in square 874, was executed in satisfaction of said indebtedness, and that, not doubting the validity of said conveyance, he has made valuable improvements on said premises, and paid large sums of money for taxes, both general and special, levied thereon; that said indebtedness was contracted antecedently to the

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political and civil disability of the said Charles S. Wallach; and he prays that the true amount of said indebtedness may be ascertained, and that the same may be decreed to be a valid lien upon said lot, and the complainants decreed to pay the same before being permitted to redeem the property.

A demurrer was interposed to the cross-bill, which was overruled at the general term; and the defendants had leave to answer and plead as they should be advised. A plea and answer were thereupon interposed. The plea was set down for hearing, and the issue thus formed was heard in the first instance at the general term. The part of the plea principally relied upon by the defendants reads as follows:

“These defendants say that on the 3d day of February, in the year of our Lord 1866, in consideration of the whole of the said pretended other indebtedness, and of all real indebtedness, by the said Charles S. Wallach to the said John Van Riswick, then existing, the said Charles S. Wallach and his wife made and executed, signed, sealed, and to the said John Van Riswick delivered their deed of conveyance, whereby, for the expressed consideration of \$11,000 in hand paid, they granted, bargained, sold, aliened, enfeoffed, released, and conveyed unto him the said lot of ground, land, and tenement in the original bill mentioned, and thereby sought to be redeemed, and also another lot of land and tenement, to wit, the western part of lot numbered 14 in square numbered 874, having a front of forty feet and eight inches on Pennsylvania avenue, in the city of Washington, with covenants of general warranty and of further assurance, which deed of conveyance the said John Van Riswick accepted and received in full satisfaction of the identical indebtedness which is by the cross-bill pretended still to exist; and the said deed of conveyance was on the day of its making duly acknowledged by the grantor and his wife, and afterwards duly recorded; all which, by a copy of the same with the said original bill exhibited, and prayed to be taken as a part of this plea, will more fully appear.

“By virtue and effect of which deed of conveyance the said

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John Van Riswick became invested with title in fee to the said western part of lot numbered 14 in square numbered 874, and continued to be so until he aliened the same, since when his alienee holds the same by that title and no other.

“Wherefore these defendants do plead in law to so much of the said cross-bill as is hereinbefore particularly mentioned, the acceptance of the said deed of conveyance in part operative and effectual, and of the covenants therein contained, as having operated the entire extinguishment of the said indebtedness; and do pray the judgment of this honorable court whether they should be compelled to make any further answer unto so much of the said cross-bill as is hereinbefore pleaded to, and pray to be hence thereof dismissed with their costs.”

It will be observed that the proposition of defendants to be established by the plea is, that the conveyance of Wallach to Van Riswick, set up therein, worked an extinguishment of the original debt, and that the only remedy of Van Riswick thereafter was upon the covenants of warranty contained in the deed. The case was heard at the April Term, 1878.

Lambert & Darlington and *Durant & Hornor*; for complainant in cross-bill.

The plea in this case belongs to the class denominated anomalous—supported by answer—which must be confined to negating the equity of the bill. Not favored in equity. Must exclude intendments against the pleader. In case at bar neither plea nor answer denies the equity of the cross-bill, to wit, the mutual error or “mistake all around,” against which relief is sought. (Tyler’s Mitford, 385; Story Eq. Pl., sec. 688; *Piatt v. Oliver*, 1 McL., 303; *Dow v. Peters*, 3 Edw., 140.)

The answer in this case overrules the plea.

Equity relieves against the consequences of misapprehension or mistake of law when mutual, or “all around,” as it is technically styled. (Story Eq. Jur., secs. 123, 134, 138;

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Adams Eq., marg. p. 189, 190; *Hunt v. Rousmaniere*, 8 Wheat., 211, 212, 216; *Lansdowne v. Lansdowne*, Moseley, 364; *Bingham v. Bingham*, 1 Ves. Sen., 127; *Corking v. Pratt*, Id., 400, debt declared to exist on cancellation of conveyance; *Ramsden v. Hoylton*, 2 Id., 364; *Hitchcock v. Giddings*, 4 Price Exch., 135, 304.)

The apparent paradox that equity will grant relief against mistake of a clear, well-settled principle of law, and withhold it where the question was a doubtful one, applies only to cases where the doubt was present to the minds of the parties, and the agreement was a compromise based upon it. (Story Eq. Jur., sec. 121; Adams Eq., 189, n. 2; Story Eq. Jur., sec. 138.) The strictures upon the cases of *Lansdowne v. Lansdowne* and *Bingham v. Bingham* proceed upon this distinction. (Story Eq. Jur., 124, 125, and note 4.)

There is no reported case in which relief against mistake of law has been denied, except where the mistake was either unilateral or made the basis of a compromise.

Pike & Pike, for defendants in cross-bill.

If a creditor accept a deed of land in payment, it is an extinguishment of the debt; and if the title prove defective, he must look to his warrants. (*Miller v. Young*, 2 Cr. C. C., 53.)

The following authorities cited: *Preston v. Young*, 4 Cranch, 239; *Toussaint v. Martinant*, 2 T. R., 105; *Weaver v. Bentley*, 1 N. Y. Term Rep., 45; Sugden, 175; *Hunt v. Silk*, 5 East, 449; *Linden v. Hooper*, Comp., 414; *Noonun v. Lee*, 2 Black, 500.)

CARTER, Ch. J., delivered the opinion of the court orally, in substance as follows:

This is a cross-bill filed by Mr. Van Riswick, praying that the indebtedness from Charles C. Wallach to said Van Riswick may be decreed a valid lien upon the property in controversy, in the hands of the heirs at law of the said Wallach, and that said indebtedness may be satisfied from the proceeds of a sale of said premises. The court have con-

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sidered this proposition with great care, and have come to the conclusion that the plea interposed by the heirs is a complete bar to this relief. The alleged indebtedness was the consideration of the conveyance. The deed embraced the property now in controversy, and also another lot of land which Van Riswick has since conveyed away.

The deed to Van Riswick contained the usual covenants of warranty, and was received in full satisfaction of the amount due. We think the indebtedness was merged in that transaction, and that the relations which had previously subsisted between them were exchanged for those created by the covenants in the deed; and we think that his remedy is upon these covenants alone. Entertaining these views, we have come to the conclusion that the plea to the cross-bill must be allowed.

JOHN A. TROOK v. THE BALTIMORE AND POTOMAC
RAILROAD COMPANY.

AT LAW.—No. 13,784.

- I. In an action for damages to real estate caused by a railroad company in using a public avenue for loading and unloading freight, witnesses who are acquainted with the value of property in the same locality may testify as to their opinion of the depreciation of said property, due to the use of said avenue for the purpose of a freight delivery.
- II. The plaintiff in such action is entitled to damage where the railroad company uses the avenue for the purposes of a freight yard or freight delivery, and where the avenue is thereby obstructed and the value of plaintiff's property diminished.
- III. In such action the plaintiff is not confined to structural damage to the building, or physical injury and harm to the land. He may also recover any other damage growing out of the unreasonable and unlawful use of the avenue.

STATEMENT OF THE CASE AND DECISION.

In 1872 the plaintiff was the owner of lot T in square 464, on the south side of Virginia avenue, between Sixth and

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Seventh streets, in the city of Washington. The improvements on the lot consisted of a frame house and a one-story brick store. The Potomac Railroad Company was authorized by several acts of Congress to extend its track into the District of Columbia, and along Virginia avenue, for the purpose of running its trains and cars. In the spring of 1872 the railroad company laid three tracks on said avenue, between Sixth and Seventh streets, consisting of one main track and two sidings, and began to run its trains on said main track, and to use the sidings to load and unload freight continuously thereafter. The plaintiff brings his action to recover damage from the company, occasioned by the unreasonable use of said avenue in such loading and unloading of freight cars in that part of the avenue fronting on his said property.

On the trial of the cause the plaintiff introduced evidence tending to show that the merchandise so loaded and unloaded at said place was of almost every description; that the freight was delivered into carts, furniture and other wagons; that often there was an accumulation of wagons for the purpose of unloading, especially when vegetables were so unloaded; that this sometimes happened to such an extent as to obstruct the travel on the avenue, and divert the travel from it to other routes.

The plaintiff also introduced evidence to show the value of the property previous to the use by the company of said tracks for a freight delivery, and that the use of said avenue had been such as to damage the value of said property.

The plaintiff also offered to prove by certain witnesses, residing near the locality and acquainted with the value of property in that section of the city, that, in their opinion, by the presence of the railroad on said avenue, together with all the actual uses of said railroad, said property had been depreciated in the neighborhood of fifty per cent. or sixty-seven per cent. of the value it had prior to the laying of said tracks, and that of said depreciation from thirty to fifty per

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cent. was due to the use of said avenue for the purpose of a freight delivery.

To the admissibility of said testimony the defendant objected, but the court overruled the objection, and defendant's counsel expected. At the close of the testimony the court, at the request of the plaintiff, gave the two following instructions to the jury:

"If the jury shall find that from about the month of July, 1872, to the bringing of this action, or during any portion of that period, the defendant used that portion of Virginia avenue lying between Sixth and Seventh streets southwest, and upon which the plaintiff's premises abutted, for the purpose of a freight yard or freight delivery, thereby obstructing the said avenue and diminishing the value of the plaintiff's said property, then the plaintiff is entitled to recover in this action."

"If the jury shall find that from about the month of July, 1872, to the bringing of this action, or during any portion of that period, the defendant occupied Virginia avenue, between Sixth and Seventh streets southwest, and in front of plaintiff's premises, by placing thereon freight cars, and keeping the same there an unreasonable time by loading or unloading and delivering freight, and, by using the said part of the said avenue for the general purposes of a freight yard or freight delivery, obstructed the avenue or so interfered with the use of the said avenue as to diminish the value of the plaintiff's said property, then the plaintiff is entitled to recover."

To these instructions defendant's counsel made objection, and exceptions were noted.

The defendant, among other instructions, requested the court to give the following:

"If the jury believe from the evidence that there has been neither structural damage to the buildings, nor actual physical injury, nor harm to the land, and that delay to the public and to the plaintiff in passing along the avenue has been the only direct wrong caused to the plaintiff by the matters set forth in the declaration, and that such wrong resulted in no

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damage to the plaintiff, except contributing, during the continuance of the use of the avenue in the way complained of, to the prevention of the sale of the property for what it might have been sold before the use of the avenue began,—if the jury believe these facts, then the plaintiff cannot recover in this action.”

This was excluded, and the defendant noted another exception.

The jury returned a verdict in favor of the plaintiff for the sum of \$4,000; of this amount the plaintiff entered an order in the cause remitting \$1,500, and his motion for a new trial on the minutes of the judge who presided in the court below was overruled. The cause is now before the general term upon a motion for a new trial upon the foregoing exceptions. The court being of opinion that the exceptions were not well taken, denied the motion.

James G. Payne, for plaintiff, cited the following authorities: *Tibbetts v. Haskins*, 16 Me., 288; *Swan et al. v. Middlesex*, 101 Mass., 177; *Clark v. Baird*, 5 Selden, 183; *Warren v. Wheeler*, 21 Me., 484; *Joy v. Hopkins*, 5 Denio, 84; *Kellogg v. Kranser*, 14 Serg. & Rawle, 140; *C. & P. R. R. Co. v. Ball*, 5 Ohio St., 568; *Gahagan v. R. R. Co.*, 1 Allen, (Mass.), 190; *The State v. Morris & Essex R. R. Co.*, 25 N. J., 438; *Lockland v. R. R. Co.*, 31 Mo., 180; 34 Mo., 259; *R. R. v. Decatur City*, 33 Ill., 381; *The State v. R. R. Co.*, 23 N. J., 360; *Attorney-General v. R. R. Co.*, 4 C. E. Green, 386, 393; *Tate v. R. R. Co.*, 7 Ind., 479; *Protzman v. R. R. Co.*, 9 Ind., 467.

Enoch Totten, for defendant, filed an elaborate brief, which we omit for want of space.

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ROBERT K. ELLIOT v. THE DISTRICT OF COLUMBIA,
JOHN F. COOK, COLLECTOR OF TAXES, AND WIL-
LIAM J. MURTAGH.

EQUITY.

- I. The collector of taxes in the District of Columbia was applied to for a statement of unpaid taxes upon certain real estate by one who did not disclose the object of the inquiry, or that he was about to become a purchaser; and it was held that the District was not estopped from making sale of said property for unpaid taxes thereon, which had been omitted by mistake from the statement furnished on such request, although the applicant relied upon the collector's statement in afterwards purchasing the property.
- II. The duties of the collector are prescribed by statute, and he is not required to make search and furnish statements of unpaid taxes. His statements and his mistakes in regard to unpaid taxes can never, therefore, operate as an estoppel upon the District of Columbia.

STATEMENT OF THE CASE.

This bill is filed to restrain the District of Columbia from enforcing the collection of certain taxes which constitute, as is alleged by the District authorities, a lien upon lots 23 and 24 in square 491, in the city of Washington.

The material statements in the bill are, that in June, 1872, one Alfred Ely was in the occupation and possession of said lots as the owner of an estate therein during the life of Cornelius Boyle. At the date just mentioned, the said Ely having neglected for several years to pay the taxes assessed on said property, a suit in equity was commenced for the purpose of requiring him to pay the taxes then due and in arrear. Mr. Elliot, who was the solicitor of the complainant in that equity suit, called upon the collector of taxes for the District to furnish him with the bills for all unpaid taxes upon said property, and the collector gave him the bills for the years 1868, 1869, 1870, and 1871. These taxes were taken into the account by the auditor, and the property was finally sold under a decree of the court, and Mr. Elliot became the assignee of

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the purchaser at the sale under said decree, and paid the taxes so reported by the collector and the auditor, together with all taxes which subsequently accrued down to the time of such sale, and the amount thereof was deducted from the purchase-money.

The District of Columbia now claims taxes for the years 1866 and 1867, and the collector has advertised the property for sale for the non-payment thereof. The complainant alleges that he purchased the property, relying upon the information which he received from the collector, and he claims that the District of Columbia cannot legally or equitably enforce the payment of the taxes for 1866 and 1867 upon said property, and that said District ought not to be permitted to sell the lots in question and thus cast a cloud upon his title, and that the District is estopped by the act of its collector. The District of Columbia and John F. Cook, the collector, filed a general demurrer to the bill of complainant in this cause; and on June 8, 1877, the demurrer was overruled, and the said defendants perpetually enjoined from offering said lots for sale for the alleged taxes of the years 1866 and 1867. From this decree an appeal has been taken to the general term.

R. K. Elliot, for complainant.

The "District of Columbia is a municipal corporation," and the collector of taxes is the officer or agent.

The statements made by that officer or agent, as alleged in the bill of complaint, *estop* the corporation from denying the truth thereof. The doctrine of estoppel applies as well to corporations as to individuals, and has even been held to apply to the United States. (*U. S. v. Collier*, 3 Bl. C. C., 325; *Mayor v. Sheffield*, 4 Wall., 189; *Lee v. Munroe*, 7 Cr., 366; *C. R. I. and P. R. R. Co. v. The City of Joliet*, 79 Ill., 39; *Dillon on Mun. Corp.*, sec. 176n.)

It is a matter of no consequence in the present case whether the taxes referred to in the bill of complaint had been paid or not, since the fact is admitted that the defendant, by its proper

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officer or agent, acting within the scope of his authority in respect of a subject exclusively, by virtue of his office, within his knowledge and control, represented that they had been paid, or, rather, that there were no taxes upon the property referred to, excepting those that were then and there paid by the complainants.

Whether this representation was true or not, according to the well-settled doctrine of estoppel, it is binding upon the District, and it must look to the bond of the collector for relief.

The decree of the special term is, therefore, correct, and should be affirmed.

Birney & Birney, for defendants.

The single question at issue in these cases is, whether the District of Columbia is estopped from making sale of certain real estate for unpaid taxes due thereon, because the collector of taxes has, by mistake and inadvertence, failed to report said taxes, among others, to an inquirer for a statement of all unpaid taxes, who did not disclose the cause of his inquiry, but afterwards, by purchasing the property, in reliance upon the collector's statement, was specially injured? The District of Columbia is not so estopped. The collector of taxes, in rendering tax bills to the plaintiff, did so for plaintiff's accommodation, and not under authority of law. There is no statute making it the duty of the collector to furnish statements of taxes due to all inquirers. His duties are statutory.

The case of *Lee v. Monroe and Thornton* is conclusive upon this question, and is, in its general outline, closely analogous to the case at bar.

There Morris and Nicholson, owing Lee \$3,000, offered payment in city lots, the title to which was in Monroe and Thornton, as commissioners of Washington city. Morris and Nicholson, having paid money in advance to the commissioners, thought themselves entitled to demand a conveyance of the lots in question. Lee applied to the commissioners to know of them if they would convey the lots to him upon the

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order of Morris and Nicholson. *This they promised to do.* Lee, upon receiving from Morris and Nicholson their order to the commissioners to convey to him, gave up to them their notes. On presenting the order to the commissioners, they refused to convey the lots unless he would pay the purchase-money due thereon. Morris and Nicholson shortly after became insolvent.

In rendering its opinion in favor of the defendants, the court said :

"If the commissioners acted fraudulently, they may be personally liable to the plaintiff; but if it were a mistake, * * * the interests of the United States cannot and ought not to be affected by it. Were it otherwise, an officer intrusted with the sales of public lands, or empowered to make contracts for such sales, might, by inadvertence or *incautiously giving information to others, destroy the lien of his principals on very valuable and large tracts of real estate*, and even produce alienations of them without any consideration whatever being received. It is better that an individual should now and then suffer by such mistakes than to introduce a rule against an abuse of which, by improper collusions, it would be very difficult for the public to protect itself." (7 Cranch S. C. R., 366 ; 2 Condensed R., 531.)

It will be noticed that the bill of complaint does not aver that the misrepresentation complained of was fraudulent; neither does it aver that the collector was informed or had notice of the object of the inquiries made to him, or of the persons in whose behalf the inquiries were made.

Under such conditions no estoppel can possibly arise against a corporation or individual, for estoppels *in pais* are not allowed to operate, except where, in *good conscience and honest dealing*, the party ought to be permitted to gainsay his admission.

There must be actual fraud by wilful concealment or misrepresentation by the party sought to be estopped, or such gross negligence and indifference to the rights of others as are equivalent to actual and premeditated fraud. (*Hannay v.*

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Stewart, 6 Watts, 489; *Walker v. Vaughn*, 33 Conn., 577; *The Governor v. White*, 20 Wis., 425; *Piper v. Gilmore*, 49 Me., 149; *Taylor v. Ely*, 25 Conn., 250; *McAfferty v. Connor*, 7 Ohio St., 99; *Ridgway v. Morrison*, 28 Ind., 201; *Rigney v. Smith*, 29 Barb., 383.)

Mr. Justice MACARTHUR delivered the opinion of the court :

This bill is filed to restrain the collection of taxes, upon the ground that the District is estopped by the action of the collector. It appears that Mr. Elliot did not inform that officer of the purpose for which he requested the bills for unpaid taxes; nor did he disclose to him that he was about to become a purchaser of the property. It is not alleged that the collector had any knowledge whatever of the object for which the tax bills were furnished. He was not informed that Mr. Elliot represented a purchaser, or that he contemplated becoming one himself. It is not pretended that he concealed or misrepresented the amount of the taxes due wilfully or intentionally. A majority of the court are clearly of opinion that the District is not excluded from claiming the taxes still due and unpaid. To hold otherwise would be to establish an estoppel where the party sought to be estopped was ignorant of the facts material to such a conclusion, and where there was not the slightest intention to mislead or deceive. The collector could have been examined as a witness before the auditor, and recourse had to the books of his office, and thus the extent of the taxes due and in arrear could have been ascertained as testimony in the usual method of judicial proceedings. This the complainant had a right to do, and having failed to exercise this right, he cannot now be permitted to claim the benefit of an estoppel for the discharge of taxes that have never been paid.

The duties of the collector are prescribed by statute. (R. S. D. C., secs. 133, 161, 175, act of Aug. 23, 1871, Leg. Assembly, D. C.) To make a search of the records in his office for unpaid taxes at the request of any one, whether connected with the title or not, or whether liable for the tax or not, is

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not one of his statutory duties. There is no fee or reward provided for making searches. No duty of this kind is imposed by law, and he is not the officer of the District for that purpose. If any person applies to him to search for unpaid taxes, or to make a certificate of the same, it is an employment outside of his official duty, and there is no privity between the person requesting the search or certificate and the District of Columbia. The law is the only standard of the extent of his powers, and all inquirers in regard to taxes are bound to take notice of the extent of his authority. His statements or his mistakes as to unpaid taxes can never, therefore, operate, so far as the District is concerned, as an estoppel. If any other doctrine should prevail, it would be in the power of a tax-payer, or of even the collector himself, to divest the District of its liens upon property in all cases of delinquent taxes.

The decree ought to be reversed.

CARTTER, Ch. J.—The complainant asks that the District of Columbia be restrained in the collection of taxes properly assessed upon the property in question. When he applied to the collector he was a stranger to the property, and not in privity of taxation with it. He failed to disclose his relations to the property, or his purpose to buy it, and he now demands that these taxes may be the same as satisfied without paying them, because he had formerly inquired of the collector for the unpaid tax bills. I do not believe that a citizen at large can, by passing through the collector's office, making an inquiry of this kind about taxes, thereby pay them and estop the District. I do not believe that the revenues of a municipality can be crippled in that way. Here the applicant for information about the taxes did not disclose that he was about to become a purchaser, or that he wanted to know in contemplation of such purchase the actual burdens upon the property. He inquired for the taxes, and the collector, as is frequently the case, made a mistake in the amount; he did not go back far enough in his search, and the doctrine in the

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decree below is that the taxes are in effect paid. I cannot concur in that view, and think the bill ought to be dismissed.

OLIN, J.—I put my opinion expressly upon the ground that the law imposes no obligation upon the collector to furnish his certificate at all. And not being within the limit of his prescribed duties, if he chooses to furnish statements he acts voluntarily, and the District is not responsible for his acts of that kind. I think the decree should be reversed and the bill dismissed.

WYLIE, J., dissented.

JOSEPH B. BRYAN ET AL. v. WILLIAM SANDERSON
ET AL.

EQUITY.—No. 5152.

An appeal does not lie from an order awarding a writ of assistance, or from an order refusing to grant it.

STATEMENT OF THE CASE AND DECISION.

The plaintiffs filed their bill in this cause, alleging that they had recovered judgment against the defendant William Sanderson, on which execution had been returned unsatisfied; that said defendant had an equitable interest in part of lot 2, square 690, the legal title of which was in Thomas E. Waggaman, under a deed of trust to him to secure an alleged indebtedness, and with power in him to sell and convey said property on default to pay such debt; and the bill prayed that the beneficiaries of that deed be required to discover the amount of their incumbrance, and that meanwhile said Waggaman be restrained *pendente lite* from making any sale under the deed to him.

This injunction *pendente lite* was granted, but subsequently, and on the 10th of May, 1877, the court, on motion of the

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plaintiff, with consent of the beneficiaries and trustee aforesaid, passed its order releasing Waggaman from the said injunction, and granting him "leave * * * to sell * * * under the deed of trust."

Waggaman afterwards sold the property to the plaintiff, and reported a balance after paying the debt secured and the expenses of sale, which balance he was ordered to bring into court. On the 20th of August, 1877, the plaintiffs filed their petition for a writ of assistance, and on the same day the writ was issued, reciting that the defendant Sanderson having been commanded to deliver possession to the plaintiffs, and proof having been made of his refusal to obey, the marshal was required to eject Sanderson and establish the plaintiffs in possession. The following day, August 21, an order was obtained by Sanderson's solicitor, from one of the justices of this court not then holding the special term in equity, requiring the plaintiff to show cause before the court on the next rule day, September 4, why the writ of assistance should not be quashed, and meanwhile restraining further proceedings under the writ. The steps intermediate to the return day of this rule need not be stated, as they were not taken into consideration by the court in deciding this case.

On the following rule day, September 4, the plaintiffs not appearing to show cause under the order of August 21, the defendant Sanderson took the order of the court requiring the plaintiffs to show cause on the following Friday why the writ of assistance should not be quashed and a writ of restitution awarded. Copy of this order was duly served on the 5th of September, and on the 7th, or return day of the order, the plaintiffs came in, and, in reply thereto, for cause, filed and read their answer. The court thereupon passed its order *vacating* its former order of September 4, 1877.

The question principally discussed at the hearing was, whether an order awarding a writ of assistance, or an order refusing to set it aside, was such an order as may be taken by appeal to the general term. Section 772 of the Revised Statutes of the District of Columbia provides that any party

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aggrieved by any order, judgments, or decree made or pronounced at any special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term, &c. The court decided that the orders in question did not involve the merits, because the merits or the material points in controversy must necessarily be settled before a writ of assistance can be awarded. The appeal was therefore dismissed as one which would not lie under the act conferring jurisdiction upon the general term.

R. K. Elliot, for complainants.

William A. Meloy, for defendants.

JOSEPH B. BRYAN ET AL. v. WILLIAM SANDERSON
ET AL.

EQUITY.—No. 5152.

The undertaking prescribed by general rule 91, need not be filed by the party appealing, unless the appeal is to operate as a stay of proceeding.

STATEMENT OF THE CASE AND DECISION.

A motion was made to dismiss the appeal in this cause, on the ground that the party appealing had not filed an undertaking such as is required by the provisions of rule 91. That rule prescribes that no appeal shall operate as a stay of execution where the judgment is for a specific sum of money, &c., and in all other cases, except where the United States are appellants, any justice of the court may determine the amount and character of the security to be given, which in all cases shall at least be sufficient to cover the costs of the appeal. The last clause seems to comprehend all appeals, whether there is a stay of proceedings or not. But the court held, that if the appeal is in other respects perfected within

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thirty days after the judgment or decree, unless it is further intended as a stay of proceedings no undertaking is necessary; and the concluding language of the rule, requiring that in all cases the security shall at least be sufficient to cover the costs of the appeal, refers only to the appeals mentioned in the preceding part of the rule, which are to operate as *supersedeas*. In the present case there was no stay of proceedings. No undertaking or security was required, and the motion to dismiss is therefore denied.

R. K. Elliot, for complainants.

William A. Meloy, for defendants.

IN RE THE CAPITAL PUBLISHING COMPANY, ALLEGED
BANKRUPT.

BANKRUPTCY.—No. 290.

- I. Words in a statute are to be taken in their ordinary signification, and the courts will presume that they were used to express their meaning in common usage.
- II. A corporation engaged in the business of printing and publishing a weekly newspaper, is not a manufacturer within the meaning of the bankrupt law.
- III. A petition against an alleged bankrupt as a manufacturer, on the ground that the bankrupt has failed to pay his promissory notes, is defective if it does not allege that said notes were made and passed in his alleged business of a manufacturer.

STATEMENT OF THE CASE.

On June 14, 1877, Henry Hill, Jr., filed a petition in bankruptcy, claiming to be the holder of certain overdue and unpaid promissory notes of the Capital Publishing Company, which he stated was a trader in the District of Columbia, and claiming also to be a creditor of the said company on an open account, and that he constituted one-fourth in number

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of the creditors of said company, whose debts exceed \$250, and that the debts he held amounted to one-third of all the debts provable against the company. To this petition the company filed its answer. Subsequently the petitioner filed his petition for leave to amend his original petition, by striking out the word "trader" and inserting in place thereof the word "manufacturer," which permission was granted by the court. Thereupon the petitioner filed his amended petition, which was a reiteration of his original petition, with the substitution of the word "manufacturer" for that of "trader."

To this amended petition the company demurred, and the case comes here upon the question: 1. Is the company a manufacturer within the meaning of the bankrupt act, and therefore capable of being declared a bankrupt? 2. Whether the petition of the petitioner is not defective for the reason that it has nowhere alleged or shown that the promissory notes referred to in it were or are the commercial paper of this company, made or passed in the course of its business as a manufacturer? 3. Has the petitioner any rights cognizable in a court of bankruptcy for the debt on the open account claimed to be held by him against the company?

The court in bankruptcy sustained the demurrer, holding that the company was not a manufacturer within the meaning of the compulsory clause of the bankrupt laws.

The petitioning creditor brought the case here by appeal.

W. D. Davidge and *Fred. W. Jones*, for petitioning creditors.

The only question to be decided is, whether or not the alleged bankrupt corporation is a "manufacturer" within the meaning of the bankrupt act. The opinion of the District Court was, that it was not a manufacturer, and therefore not liable to be adjudged a bankrupt.

But one decision exactly in point can be found in the *published* Bankruptcy Reports, and this is the case of "*Kenyon and Fenton*," reported in 6 Bankruptcy Register Reports, p. 238, in which the court says:

"The printing and publishing of a daily newspaper is man-

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ufacturing, in the strict sense of the law. A newspaper publication is as much the result of manufacture as that of books, or cards, or bill-heads."

The weekly newspaper the manufacture of which is the only business of the defendant, is an *unbound book* of eight pages, and contains more reading matter than many bound "books," especially those called juvenile books.

The alleged bankrupt is not a "trader," because the decisions are numerous and harmonious in their construction of the word, and are all embodied in the definition of the word "trader," as follows:

"One who makes it his business to buy merchandise, or goods, or chattels, and to sell the same for the purpose of making a profit." (Bouv. Law Dic., 14th ed., 1876.)

A *trader* bestows no labor upon an article to give it an increased value, but sells it in the same condition in which it was bought, and this, it is asserted, is the principal feature distinguishing "traders" from "manufacturers."

It will scarcely be denied that a person who should purchase sole leather from one person, upper leather from another, thread and wax from another, nails and pegs from another, tools and implements from another, and by the use of the tools and materials thus gathered, and contribution of manual labor, makes a shoe or boot for the purpose of sale, is a "manufacturer" within the meaning of the law.

What does the alleged bankrupt do, and what its business? Its charter states:

"To carry on the business of printing and publishing a newspaper called 'The Capital,' and all business connected therewith, and such other business as ordinarily appertains to the printing and publishing a newspaper."

To carry on this business, it must purchase types from a type founder; type cases from a carpenter or case-maker; a printing-press from a press-maker; blank paper from a paper manufacturer; employ editors and writers to furnish reading matter; printers to set the types; pressmen to do the printing; and by the combination of all these, makes or manufactures

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a "newspaper" for the purpose of selling the same. It makes "a new combination of old materials, constituting a new result or production in the form of a vendible article," precisely within the definition in Bouvier's Law Dictionary, 14th edition, title PATENTS.

R. T. Merrick and *Henry Wise Garnett*, for alleged bankrupt.

The following passages are extracted from Mr. Garnett's brief:

In short, the burden of proof is upon the appellant; in this case he states and claims that the appellee is a manufacturer with the meaning of the bankrupt act. He must therefore prove that it is such a manufacturer. In this he has clearly failed. How is he to prove it? Not, I submit, by technical definitions of the word manufacturer, but upon a construction of the word as taken in its connection with other words in the statute. The counsel for the appellant have exhausted the dictionaries in their search for dictionary definitions of the word manufacturer, taken simply and alone. It is not by tying ourselves down to the mere naked definition of a word that we can arrive at the meaning of the law; if we were to accept the interpretation the counsel for the appellant desire to put upon this law, the simple act of whittling a tooth-pick would make the whittler a manufacturer within the meaning of the bankrupt law. This is not the spirit with which this law is to be construed.

The compulsory or involuntary clause in the bankrupt law is in the nature of a penal statute, and is therefore to be construed with the greatest strictness. It is a harsh, summary proceeding, which is not to be favored or extended beyond the narrow boundaries within which it has been confined; indeed, compulsory bankruptcy has been opposed by some of the greatest minds of this country as inexpedient and not in harmony with the spirit of our institutions. In the debate on the bankrupt bill of 1841, Mr. Webster, Mr. Calhoun, and Mr. Clay all took these grounds, and, with many illustrious companions, opposed and voted against the compulsory clause

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in that bill. And the present act shows the distinction intended between voluntary and involuntary bankruptcy; for while any resident of the United States owing three hundred dollars of debt can become a voluntary bankrupt, only in a few limited instances is the compulsory feature of the law allowed to operate and become effective.

In England, since the act of 1861, all debtors, whether traders or non-traders, are liable to bankruptcy, but the temper and spirit of our law is different; and with us this severe and dangerous liability is bounded and circumscribed with the greatest care, and regarded with no favor beyond that which the closest construction of the law compels.

This being the spirit of the law, I submit that the appellee is not a manufacturer within the meaning of that law.

If I take a sheet of paper, and with pen and ink write certain characters upon it, I have, according to the dictionaries of the appellant's counsel, manufactured a letter, for I have applied the art of writing and the labor of penmanship to the paper, and by my *hand* I have *made* a letter, and yet this would not be manufacturing within the meaning of the bankrupt law. Going a step further, suppose I rewrite the letter a number of times and sell the copies, still I would not be liable to be declared a bankrupt as a manufacturer. If, instead of rewriting this letter, I see fit to buy a press and employ printers to print it for me, I am still not a manufacturer within the meaning of the bankrupt law; but, say the counsel for the appellant, you are a manufacturer, for you buy paper and print your letter on it. But the reply to this is, I make no change in the paper; it is merely an incident. I only use it for the purpose of writing or printing on it such ideas or statements as are contained in my letter; it is these ideas or statements that the public buy—not manufactured paper. The paper is a matter of indifference; it is only the material on which it is most convenient to mark or print the characters which express the ideas, or convey the intelligence, which could be written or printed on many other substances as well as paper. If, then, I have not changed the nature of any article, and

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have made nothing by my hand, or the hands of my employees, except a record of my ideas or the information I desire to give, upon a substance which remained the same after the record as it was before, I do not come within the meaning of the bankrupt law when it uses the word "manufacturer."

The bankrupt law was passed for the relief of business men. It was and is a business, a commercial, measure. It was made for bankers, merchants, traders, miners, and manufacturers in a business acceptance of the term; which certainly does not embrace the publication of a newspaper, which, as we have seen, is defined to be a "sheet of paper printed and published at stated intervals for conveying intelligence of passing events." The newspaper is the medium of the conveyance of intelligence and ideas; for the exchange of thought. It is the surest protector of the liberties of the people, for its vital breath is the air of freedom, and it reaches its highest perfection only in those countries where that air is purest. The press moulds public opinion, and by the universal intelligence which it diffuses prevents covert attacks upon our liberties. It is the great educator of the masses and at the same time the reflector of their sentiments. Many of our people depend upon their newspaper for their knowledge of the political measures upon which they are called to cast their votes; its power is felt and respected by the law-maker, for he knows that through its columns his every action is held up before the scrutinizing eyes of his constituents for their criticism or approval.

Mr. Justice MACARTHUR delivered the opinion of the court:

This is a petition in bankruptcy to have the Capital Publishing Company declared an involuntary bankrupt. The petition was filed June 14, 1877, and after an answer had been put in by the company, the petitioning creditor, George Hill, Jr., obtained leave to amend his original petition by striking out the word "trader" and inserting "manufacturer" in lieu thereof. So that the petition as amended charged that the

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company, on the 28th day of April, 1877, being a manufacturer, omitted to pay its promissory note dated March 26, 1877, and payable thirty days after date, with interest at the rate of eight per centum per annum, but suffered the same to be and remain unpaid and be protested for non-payment, and still omits, refuses, and neglects to pay the same; said note being for the sum of \$395.45, and being commercial paper, and so has suspended payment of its commercial paper and has not resumed payment within a period of fourteen days.

The company demurred to the petition as amended, on the ground that the company was not a manufacturer within the meaning of the bankrupt act, and therefore not capable of being declared a bankrupt; and that the petition of the appellant was defective for the reason that it has nowhere alleged that the promissory notes referred to in it were or are the commercial paper of the company, made or passed in the course of its business as a manufacturer.

The petition describes the alleged bankrupt to be a corporation organized under and by virtue of the acts of Congress in such case made and provided in the District of Columbia, which for a period of six months has had its habitat and carried on business at the city of Washington, in the District aforesaid. The point was raised on the argument that the demurrer admitted the company was a manufacturer. But in determining this question we may properly look at the act of incorporation thus referred to in the petition. The certificate of incorporation describes the object of the company in the following words: "To carry on the business of printing and publishing a newspaper called 'The Capital,' and all business connected therewith, and such other business as ordinarily appertains to the printing and publishing a newspaper."

The first question raised upon the demurrer is whether the company is a manufacturer within the meaning of the bankrupt act.

Words in a statute are to be taken in their ordinary and familiar signification, and regard is to be had to their general and popular use. The court will presume that they were

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used to express their meaning in common usage. Keeping in mind this rule of interpretation, we can determine the judicial construction to be placed upon the word "manufacturer" when it is used in the bankrupt law.

There can be no doubt but the word "manufacturer" was used in the statute in the limited sense in which it is commonly understood. The agriculturist is engaged in the most extensive industry of this or any other country, and he brings to the market many commodities which are produced without the direct aid of the soil, or of the vegetative powers of nature, but he is never spoken of in common parlance as a manufacturer. The industries to which the dictionaries and the writers on political economy limit this term are where the raw materials or natural substances are wrought by hand, art, or machinery into commodities for use; and the examples given are cloths, iron, shoes, cabinet-work, glass, cotton and silk goods, &c. This limitation of the term manufacturer is to be adopted as the true meaning of the bankrupt law. Perhaps there is no substantial difference between the various branches of industry in any respect, except only in regard to the different processes which they employ. To manufacture is to change and modify natural substances so that they become articles of value and use. Chantrey was in the habit of receiving \$3,000 for a single bust, Bierstadt \$25,000 for a single picture, and the representation of Lincoln's Cabinet was purchased at a cost of \$20,000, and presented by a noble-hearted American lady to the Congress of the United States. These are called works of art, but in a legitimate sense they may be comprised among the productions of manufacturing industry. The artists use material and natural substances. They oftentimes employ a variety of subordinates. They work with their hands, and perfect an article of great pecuniary value. It symbolizes their art and genius. In a word, the artist accomplishes all that is implied by, but he is never included in, the term manufacturer. The definitions and rules which obtain in the Patent Office are not applicable here. A newspaper is not regarded as a manufacture any more than

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a painting, and an editor a manufacturer as little as an artist. We have been referred to the case *in re* Kenyon and Fenton, decided by the Supreme Court of Utah. It was a case where the bankrupts carried on the business of printing blank books, cards, bill-heads, in addition to which they published a daily paper, and the petition alleged that they published the newspaper and "are manufacturers of books, cards, bill-heads," &c. And the court say:

"Though it is not necessary to decide that the printing and publishing of a daily newspaper is manufacturing in the strict sense of the law, yet my brother judges have *expressed the opinion that it would be*, and I am inclined to the same conviction."

It will be observed that the decision is placed upon the ground of the bankrupts being manufacturers of books, bill-heads, &c.; and in this respect they were undoubtedly within the meaning of the act. Having come to this conclusion, the court further say that it is not necessary to decide that the publishing of a newspaper is manufacturing within the strict sense of the law, but express the opinion "that it would be." No more weight can be given to this voluntary case than to any other conditional *obiter dictum*. It might be respectfully suggested that the substantial difference between the strict sense of the term "manufacturer" in the abstract, and the strict sense it is to receive in the law, has been overlooked in this decision. We have already stated the proposition that every branch of industry which converts any material or substance into useful commodities, strictly speaking, comes under the term "manufactures," and in that sense a newspaper or a painting would be included. But we are of opinion that this is not the strict sense of the statute, which only includes those industries which commonly pass under that designation. This is an important distinction; for while all employments rest upon the same faculty in man to labor, to contrive, and to mould the refractory elements of matter, common usage and the convenience of society have given a limited signification to the word. The rule already adverted

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to for the interpretation of statute law limits its import to the sense in which it is usually received. Now, no definition of the word "manufacturer" has ever included the publisher of a weekly newspaper, and the common understanding of mankind excludes it. You may reason by analogy, or reason from the nature of things, that it is; and so you may do the same thing with anybody who labors himself or employs others. But surely a bankrupt law is not to be expanded to cover every employment. It was by express terms limited to certain classes, who are designated by names well known in the business world. The husbandman prepares the soil; the inventor his models; the orator his address, for which he receives \$200 a night; the lawyer makes his brief, for which he scarcely ever gets enough; the physician formulates his prescription; and so on through all the divisions of labor and industry. By these means man acquires a certain mastery and is furnished with inestimable results. So of the newspaper. It has grown within a century into the most popular vehicle for the spread of information. Its vigor and influence are felt in every household. Indeed, it may be called the people's storehouse of intelligence. It claims to be an institution, and even our statesmen, with great complacency, have denominated it "the fourth estate." It does not come within the popular meaning of the term "manufacture," unless, indeed, when its contents are slenderly endowed with the truth, or when its articles appear to be made out of whole cloth. It gives employment to printing-presses and types and editors; and yet, in the whole history of newspapers, from the close of the seventeenth century, this word "manufacturer" has never been applied to them, or appropriated by them, in the whole range of English literature. No author has ever so used it, and it is never so applied by any statute or by any authority, except by way of opinion in the solitary case from Utah.

All the judges who heard the case are of opinion that the alleged bankrupt corporation is not a manufacturer within the meaning of the bankrupt act, and not amenable to bank-

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rupt proceedings, except the chief justice. We are unanimous in holding that the petition is defective in form, for the reason that it does not allege that the promissory notes therein mentioned were the commercial paper of the alleged bankrupt, made or passed in its alleged business of a manufacturer. This, however, may be the subject of amendment, and for that purpose we sustain the demurrer, with leave to the petitioner to amend as he may be advised, and should he desire to take the case further. We have, however, decided the question that the corporation is not liable to be adjudged a bankrupt. So that after the formal corrections are made there will be no necessity for a rehearing of the case, and the final judgment of the court will be to sustain the demurrer and dismiss the petition.

MARY A. STRAIT v. NEWTON A. STRAIT.

EQUITY.—No. 5147.

- I. A decree of divorce obtained in the Court of Common Pleas of Pennsylvania, by one who does not reside there, is void for want of jurisdiction, and will be so declared here.
- II. Fraud may also be set up against a judgment of divorce obtained in another State.

STATEMENT OF THE CASE.

This is the case of a petition, by the wife, for a divorce; and for cause of divorce she charges the defendant with cruelty of treatment towards her, endangering her life and health, and with desertion for the period required by our statute.

Defendant's answer sets up a decree of the Court of Common Pleas of Lycoming county, Pennsylvania, obtained January 28, 1876, by defendant, divorcing him from the bond of marriage with the complainant, upon his application, alleging desertion upon her part since June, 1873.

By her amended bill complainant charges fraud in the pro-

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curement of said decree, and want of jurisdiction in the court rendering the same.

The testimony shows that the defendant, then a child thirteen years of age, removed, with his parents, in 1861, from Lycoming county, Pennsylvania, to the city of Washington, where he has ever since remained, employed first in the ambulance corps, then in the service of an express company, and for the residue of the time in the United States Pension Office. The parties were married here, where both have continuously resided ever since. The alleged desertion of defendant by complainant is laid here. Defendant's Pennsylvania application for divorce was verified in the office of the clerk of this court, and the whole of the testimony offered in support of it was taken in this city, within three or four squares of complainant's residence, but without notice to her.

Complainant has never resided in Pennsylvania, and her first knowledge of the proceedings had there was derived from the copy of the decree filed with the defendant's answer to her bill. The jurisdiction of the Pennsylvania court is attempted to be supported on the ground that defendant has been in the habit of making an annual visit, of about one month's duration, to his parents, in Lycoming county, to which place they returned about one year after the removal to Washington; of claiming a residence there, and, since a year or two subsequent to his marriage, of voting there at elections.

A copy of the Pennsylvania decree is attached to the plea, and a copy of the statute of that State concerning divorce is among the proofs; from which it appears that the petition may be filed in the Court of Common Pleas of the proper county where the injured party resides. The act of 1858 extended the jurisdiction, with a proviso "that the applicant shall be a citizen of the commonwealth, or shall have resided therein for the term of one year, as provided by the existing laws of this commonwealth."

The plea was set down for hearing upon the proofs, and certified to be heard at the general term in the first instance.

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R. T. Morsell, for complainant.

L. G. Hine and *S. T. Thomas*, for defendant.

CARTTER, Ch. J., delivered the opinion of the court, substantially as follows :

The bill in this case is for a divorce on the ground of desertion. Defendant's answer sets up a decree of the Court of Common Pleas of Lycoming county, Pennsylvania, obtained by the husband January, 1876, divorcing him from the bond of matrimony with the complainant, upon his application, alleging desertion, on her part, since June, 1873.

The complainant charges that the said decree was procured by fraud, and that the court rendering the same had no jurisdiction in the case, and we think she is correct in both propositions. Under the laws of Pennsylvania, the party exhibiting a petition for divorce must reside in the county where he brings his or her suit. Now, the defendant came, with his parents, when a child, to live in Washington. His parents returned to Pennsylvania, but he remained here in the employment of the government. Here he reached his majority, being engaged in various ways, both military and civil. He was married here, and resided with the father of his wife. He separated from her in Washington. Under these circumstances we do not think he resided in Pennsylvania. Now, whether the decree is void because it was without notice to the complainant, and because she never resided in that State, it is not necessary to determine; for, independently of that consideration, it is clear that the husband had no such residence in Pennsylvania as to give jurisdiction to the courts of that State in an action of divorce.

The circumstances relied on to establish fraud lead to the same conclusion. Although he went to Pennsylvania to obtain his divorce, his petition in that case was prepared in this city, and was sworn to before the clerk of this court; and he took all his proofs in Washington, within two squares of where his wife resided, without any notice and without any service. There is no concealing the fact that he designed to

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obtain a divorce without her knowing it. Where fraud is so apparent, we think it may be set up against the divorce, although the judgment was obtained in another State. The circumstance that he was permitted to vote in Pennsylvania is not one to which we attach much importance on a question relating to the domestic relations.

The plea is overruled, and the case remanded to be proceeded in accordingly.

EX-PARTE GEORGE ROBINSON.**HABEAS CORPUS.**

A prisoner indicted for assault and battery with intent to kill, may be convicted of the lesser offense.

STATEMENT OF THE CASE AND DECISION.

The appellant, Robinson, was tried in the March (1878) Term of the Criminal Court, upon an indictment for assault and battery with intent to kill, convicted of an assault and battery only, and sentenced to one year in jail.

He applied for his discharge by proceedings under *habeas corpus*, upon the ground that exclusive jurisdiction of the offense of which he was convicted is vested in the Police Court, and upon refusal appealed to this court.

By the act of Congress establishing the Police Court, "*original and exclusive jurisdiction*" was conferred upon it "of all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary."

The court in general term expressed the opinion, that although the criminal term of this court has no original jurisdiction to try a case of assault and battery, yet, when the criminal is tried for the commission of that offense with intention to kill, he may properly be convicted of the lesser of-

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fense, if the jury are satisfied that he was not guilty of the felonious intention. The indictment includes it, and the court has unquestioned cognizance over that indictment.

The petition must be dismissed and the prisoner remanded.

A. C. Bradley, for petitioner.

WILLIAM CAHILL v. THE DISTRICT OF COLUMBIA.

AT LAW.—No. 16,066.

Where the Board of Public Works of the District of Columbia, in pursuance of an act of the Legislative Assembly, appropriated private property for a public street, and procured the same to be condemned, and a jury to assess the owner's damage, and also paved and curbed the same and dedicated it to public travel, the District is estopped from denying its power in the premises, and the owner will be entitled to the damages awarded by the jury. The owner's consent to the appropriation of his property is to be inferred from his bringing an action to recover the damages.

STATEMENT OF THE CASE.

By an act approved June 26, 1873, the Legislative Assembly of the District of Columbia authorized the Board of Public Works to extend M street from New Hampshire avenue to Twenty-first street, and to assess damages to the owners of property which may be taken for the extension, if any shall be sustained; and the amount necessary for payment of damage was thereby appropriated out of the general fund. The plaintiff brings this suit against the District to recover the sum of \$893.65, the amount awarded to him by a jury for 1,190.82 square feet of ground condemned and taken into said street from his lot lettered G in square numbered 72, in the city of Washington, and the further sum of \$165 for 220.08 square feet taken for the same purpose from his lot lettered B in said square. The plaintiff's declaration avers that, pursuant to said act of Assembly, on October 1, 1873,

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the defendant entered upon and took possession of said ground, and has ever since retained such possession, whereby the said defendant became liable to pay the plaintiff the sums of money awarded to said plaintiff by the jury aforesaid for said ground so taken into said street as aforesaid, amounting in the aggregate to the sum of \$1,058.65. It is also stated that defendant, being so liable, promised to pay the same. The common counts are added. The survey or plan of M street as extended over the private property of plaintiff is annexed, as is also the surveyor's certificate, which states that the said street is now paved, graded, and curbed, and showing also the quantity of land taken and condemned.

The defendant interposed a demurrer on the ground principally that the condemnation of the land was *ultra vires* of the municipal corporation of the District of Columbia.

On the 25th day of November, 1876, the demurrer was overruled and an appeal taken to the general term.

L. G. Hine, for plaintiff.

As to the third ground of demurrer: While the exercise of the right of eminent domain is not expressly granted by Congress to defendant as to streets, we contend that it is granted by implication, and that its exercise of such right in this case, where the land taken was for public use—*i. e.*, a public street, and not for mere ornamental purposes—was entirely legal. (Rev. Stats. Dist. Col., sec. 2; 1 Dillon on Mun. Corp., sec. 82.)

Passing to defendant's fifth ground of demurrer, we say that defendant having taken possession of the plaintiff's land, graded and paved it as a public street, and thrown it open for travel, is such a ratification of the proceedings as estops it from afterwards denying the validity of the same.

William Birney, for defendant.

The condemnation of land for the streets of Washington was *ultra vires* of the municipal corporation of the District of Columbia and void.

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1. The municipal power of Washington has been always limited to *repairs* of streets laid out on the original plan of the city.

The power to condemn ground for *alleys* has been given, but for *streets*, never.

The charter powers are: "To keep in repair all necessary streets," * * * "and to pass regulations necessary for the preservation of the same, agreeably to the plan of the said city;" (Chart. of 1802, sec. 7;) "to open and keep in repair streets," * * * "agreeably to the plan of the city;" (Chart. of 1820, sec. 7;) "to cause new *alleys* to be opened through the squares, and to extend those already laid out, upon the application of the owners of more than one-half the property in such squares;" (Chart. of 1820, secs. 5, 8;) "to cause new alleys to be opened into the squares, and to open, change, or close those already laid out." (Chart. of 1848, sec. 2.)

CARTTER, Ch. J., delivered the opinion of the court orally:

The question which has been principally discussed in this case relates to the powers of the District of Columbia to extend M street through private property. It is material to consider that this objection is not raised by the owner of the property. Indeed, by bringing his action for damages, he has consented to the appropriation of his land. Besides, the District authorities have not only condemned this property and procured a jury to assess the damage, but they have taken possession of it, and dedicated it to the purpose of a public highway, and curbed and paved it for the public use. The case, we think, ought to be decided in view of these circumstances. It is not necessary to pass upon the question of power in the Legislative Assembly to pass the act of June 26, 1873. The power of opening streets and extending them through private property is usually delegated by the State Legislatures to municipal corporations, and they are constituted the sole judges of how and when the power should be exercised; the limitation being, of course, that compensation shall be made to the owners. We are not inclined to decide

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whether Congress had invested the Legislative Assembly with this right of condemning private property. It is perhaps inferable from their general legislative authority, and hence within the corporate powers of the District under the territorial government. But on that subject we do not desire to express an opinion. It is sufficient that the property in question has been appropriated for the purpose of a street. The plaintiff has been deprived of its use and occupation, and the defendant has dedicated it to the public use, and that dedication has been accepted and acted upon by the municipal authorities with the consent of the owner. It seems to us that these circumstances should relieve the case from any objection on the ground that the District had no right to appropriate this ground to the public use. The owner's consent ought to remove any objection of this kind, and the District should not be permitted to set up its own wrong or irregularity to defeat the award of a jury summoned at its own instance for the express purpose of condemning the land and assessing plaintiff's damage. A judgment in favor of the plaintiff will estop him from claiming any interest in the ground occupied by the street. There must be judgment in favor of the plaintiff upon the demurrer.

THE CHARTER OAK LIFE INSURANCE COMPANY v.
HENRY H. TALLMADGE AND LEWIS C. TALLMADGE.

AT LAW.—No. 17,013.

This court will quash a writ of certiorari issued to remove proceedings before a magistrate under the landlord and tenant act, where it appears that the justice is not exceeding his jurisdiction. Nor will it be sufficient to sustain such writ that the tenant alleges that he has made improvements upon the demised premises, by reason of which there has been no default in payment of rent.

STATEMENT OF THE CASE.

Proceedings under the landlord and tenant act were instituted by the plaintiff against the defendants before Charles

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Walter, Esq., a justice of the peace, to recover possession of certain real estate in the city of Washington occupied by the defendants as tenants of the plaintiff. Before trial the defendants removed the proceedings to this court by certiorari upon a petition, of which the following is the substance:

That the plaintiff has caused a summons to be issued by said justice to recover from the petitioners the possession of certain premises leased by the plaintiff to them on the 1st day of September, 1875, for the term of ten years, by lease signed, sealed, and acknowledged according to law; that the plaintiff claims that said lease had been forfeited by non-payment of rent and taxes, while they claim to have expended a large sum of money in necessary improvements, and such as were essential to enable them to profitably use the same as a public hall, for which it was leased, and for which they are entitled to credit, and therefore there has been no default and forfeiture; that the amount which they claim should be allowed is not less than \$5,500, and they are advised that the questions and amounts involved in the case are such as a justice of the peace has no jurisdiction to try and determine; wherefore they pray this writ.

By the return of the magistrate the original complaint and summons are sent to this court, from which it appears that on the 30th of December, 1876, a complaint was made before him by the Charter Oak Life Insurance Company, by Asahel H. Dillon, Jr., its second vice-president, that the premises in question, describing them, were unlawfully detained from said company by the defendants, to whom it had leased them, and whose estate therein had been determined "by default in the payment of rent, and also by default in the payment of the taxes as in said lease provided," and a summons was asked, as is usual. This complaint was sworn to by said Dillon; a summons was issued, returnable on the 11th of January, 1877, and was duly served January 3. Upon the return to said writ of certiorari a motion was made by the plaintiff at special term to quash the writ, and in case the motion could not be at once heard, that the defendants be required to give

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security for intervening rents and damages. The chief justice, holding the special term, upon the defendants giving such security, certified the motion to quash to be heard in general term in the first instance.

S. S. Henkle, for petitioners.

S. R. Bond and *W. F. Mattingly*, for the insurance company.

If the defendants claim to have paid or tendered the rent and taxes, that is a question for the magistrate to try. But they do not claim this. They claim a set-off on account of alleged expenditures for repairs or improvements. For such expenditures the tenant has no legal claim against his landlord, unless by special agreement, and none is pretended to exist in this case. (Taylor's Land. and Ten., 5th ed., secs. 327, 328; 1 Wash. on Real Prop., 1st ed., p. 348; *Moffat v. Smith*, 4 Comst., 126; Waterman on Set-offs, 1st ed., sec. 520; *Howard v. Doolittle*, 3 Duer, 463.)

There can be no set-off in proceedings for possession. The action, to allow a plea of set-off, must be on a demand which could itself be pleaded as a set off. (2 Blackstone, p. 305, note; Waterman on Set-offs, secs. 127, 147.)

The return of the magistrate shows that the plaintiff had complied with all the requirements of the law necessary to give him jurisdiction.

There was a complaint on oath charging unlawful detainer of the premises by the defendants, to whom the "complainant leased the same, and whose estate therein has been determined by default in the payment of rent, and also by default in the payment of the taxes as in said lease provided," and a summons was issued thereon in due form. The truth or falsity of this complaint is the very question for the magistrate to try. Section 686 of the statute provides: "If it appears by default or upon trial that the complainant is entitled to the possession of the premises, he shall have judgment and execution for the possession and costs; if the complainant becomes nonsuited and fails to prove his right to possession, the defendant shall have judgment and execution for his costs."

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CARTTER, Ch. J., delivered the opinion of the court orally:

We do not think that the proceedings in this case can be removed from the magistrate into this court for the cause alleged by the petitioner. The writ of certiorari will issue when the justice of the peace is proceeding without jurisdiction. But that is not the case here. He is enforcing a remedy conferred by the statute to recover possession of premises upon which the tenant is in arrear for rent, and upon which he has neglected to pay taxes, contrary to his agreement. This is a matter which the magistrate is expressly authorized to try by the act of Congress. The petitioners say that they have made extensive improvements upon the property, and that therefore they are not in default. They estimate the valuation of such improvements at the sum of \$5,500, a larger amount than is due for rent, and urge that the questions and amounts involved in the case are such as a justice of the peace has no jurisdiction to try. This action is under the statute "to regulate proceedings between landlord and tenant," and does not depend upon the value of the property or the amount or character of the rent due and unpaid. It is a summary remedy given to the landlord whenever the lease has been determined by the proper notice to quit, and the proceeding must then be conducted to a judgment before the magistrate. Any other construction of the statute would be to render its provisions useless; and if the case could be removed into this court at the option of the tenant before the trial, the party might be unable to rescue his property before the increasing burdens would consume it.

The court see no reason for sustaining the writ of certiorari in such case, and an order must be passed to quash it.

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IN THE MATTER OF GEORGE TAYLOR.

HABEAS CORPUS.

From the final decision of one of the justices of this court at chambers, upon the hearing and determination of a *habeas corpus* discharging the prisoner, an appeal may be taken to the general term at the instance of the Attorney-General of the United States. Section 763 of the Revised Statutes of the United States is applicable to the District of Columbia.

The case is stated in the opinion of the court.

William A. Cook, for the relator.

H. H. Wells, for the United States.

Mr. Justice MACARTHUR delivered the opinion of the court:

This is a motion to dismiss an appeal from the final decision of the chief justice of this court upon a writ of *habeas corpus*.

The petitioner for the writ was indicted in the Circuit Court of the United States for the District of Louisiana, and being found here was arrested upon a warrant by the marshal for the District of Columbia. He applied to the chief justice of this court for a writ of *habeas corpus*, and upon the hearing of the case an order was made discharging him from custody on the 16th day of February, 1878. From that order the district attorney, acting under instructions from the Attorney-General of the United States, took an appeal to the general term. The petitioner now makes a motion to dismiss the appeal upon the ground that no appeal lies from the decision upon *habeas corpus* in this District. This is the only question presented for our consideration.

The great weight of authority at common law is undoubtedly against an appeal in such case, and the current of authority in most of the State courts is, that a review of a decision on *habeas corpus*, independently of statutory provisions, cannot be had by writ of error or appeal. The decision is regarded as final and conclusive. (Hurd on Habeas Cor-

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pus, 567, and the cases there cited.) And the reason of this rule appears to be that in such case there is no final judgment, and the party is not concluded from applying again. There are many cases reported where the prisoner has been remanded, and then applied to another judge or another court, for the reason that the first decision was held not to be a final judgment, and it is only from a final judgment that a writ of error is allowed at common law. I find, upon reference to the decision of the Supreme Court, that this doctrine has been apparently recognized. In *ex-parte Lange*, 18 Wall., 163, the prisoner procured a writ of *habeas corpus* from a circuit judge, and upon the hearing of the same in the Circuit Court the writ was discharged and he was remanded into custody. Afterwards he applied to the Supreme Court for *habeas corpus*, and no objection was stated on account of there having been a previous writ of the same kind, nor was the circumstance commented upon by the court. In the recent case of *ex-parte Parks*, 3 Otto, 18, the party having been remanded in the Circuit Court, applied to the Supreme Court, and the writ was issued and heard upon its merits. Indeed, the principle that where a party has been remanded upon a previous hearing of this kind does not conclude him from applying again, seems to be sustained by authority almost universally recognized, and must proceed upon the ground that the decision in the first application was not a final judgment, and therefore not appealable.

Provision has been made in most all the States for an appeal on *habeas corpus*, thus giving to the decision in such case the effect of a final judgment. In some of them an appeal is given only when the prisoner is remanded, and in others, one is also given when he is discharged; and in these latter cases the appeal is taken at the suggestion of the Attorney-General.

Section 763 of the Revised Statutes of the United States provides for an appeal in these words: "From the final decision of any court, justice, or judge inferior to the Circuit Court, upon an application for a writ of *habeas corpus*, or

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upon such writ when issued, an appeal may be taken to the Circuit Court for the district in which the case is heard;" and sections 765 and 766 provide for certain matters of practice on such appeals, and for the safe-keeping and protection of the prisoner until the case can be heard and determined.

The question principally discussed in this case was whether the section of the Revised Statutes already referred to prevails in this jurisdiction. It was contended by the petitioner that the section was not locally applicable here; that consequently the common law was in force, unmodified by any statutory provision; and that no appeal can be taken, and that the motion to dismiss ought to be allowed. We have, however, come to the conclusion that the act is in operation within this District. The language of the statute is general and without any limitation as to the locality to be affected. It is general enough and broad enough to have a practical application here. The argument that the provision is confined in express language to an appeal "from the final decision of any court, justice, or judge inferior to the Circuit Court," was urged with great earnestness. It may be conceded that there is in form no judicial officer here inferior to a Circuit Court, and that the chief justice, who heard and determined the case, was not a judge or justice inferior to a Circuit Court. But we think this is a verbal criticism which should not overcome the plain intention of the act. It is to be remembered that the judges of this court are invested with the powers and jurisdiction of circuit judges, and that this court has all the jurisdiction conferred upon it in express terms by the organic act of a United States Circuit Court. It is inevitable that whenever there could be an appeal in the one case there could be in the other. The case was heard by the chief justice at chambers. Was he a judge or justice inferior to a Circuit Court? For the purpose of hearing this appeal we have the powers of the latter, and it can scarcely be contended that any judge of this tribunal at chambers is not inferior according to the true meaning of the law. We know that many of the most important questions relating to personal liberty, to

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the jurisdiction of courts, and the constitutionality of acts of legislation, are involved in the trial by *habeas corpus*. A judge sitting alone should not be intrusted to pass upon matters of so much concern in a summary proceeding, without any power to review and reverse, if necessary, his determinations. The highest considerations of public policy as well as a proper construction of the statute sustain the same conclusion. If the common law is in force in this District, without being affected by the Revised Statutes, there is not only no appeal, but the return of the officer would conclude the prisoner. But the act provides that upon the coming in of the return, the party may controvert it and introduce any facts or circumstances material to the case. The protection here afforded the citizen is to be excluded from this District if the general law is not applicable to our people, and we will be remanded back to the condition of things which induced the English Parliament, two hundred years ago, to interfere in behalf of this writ, and to make provision that it should be properly administered.

It was urged in argument that, if the act was available here, an appeal would only lie at the instance of the relator when he was remanded. The subject of the Revised Statutes was to regulate proceedings on *habeas corpus*. The language giving appeal is general, and we think it would be straining the meaning of the Legislature to confine it to one side. The object to be attained by an appeal on the part of the State may be entitled to as much consideration as any question in the case; and since no such partial meaning is expressed, we have no right to abridge its operation.

The motion to dismiss is denied.

NOTE.—The decision in the foregoing case was pronounced at the April Term, 1878, and in the September following an application was made for a rehearing, which upon deliberation was denied.

Mr. Justice HUMPHREYS dissented.

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EDGAR H. BAKER v. WILLIAM DENNISON AND JOHN
H. KETCHAM.

AT LAW.—No. 15,486.

The Commissioners of the District of Columbia were invested with authority, under the second section of the act of June 20, 1874, to remove a justice of the peace from his office.

STATEMENT OF THE CASE AND DECISION.

The declaration in this case sets forth that the plaintiff was a justice of the peace in and for the District of Columbia, and that the defendants are Commissioners of said District, and as such Commissioners, in connection with one Henry S. Blow, who has since deceased, did, on or about the 26th day of January, 1875, issue an order depriving the plaintiff of his commission as such justice of the peace, and that said act of the defendants was without authority or jurisdiction. In consequence whereof plaintiff has sustained damages to the extent of \$10,000.

The defendants demurred to this declaration as being bad in substance, and gave notice that they would argue in support thereof that the defendants and said Blow, as Commissioners of said District, were invested with authority of law to remove the plaintiff from his said office.

The case was heard at general term in the first instance.

The second section of the act of June 20, 1874, organizing the Board of Commissioners, provides: "That nothing in this clause contained shall affect any provisions of law authorizing or requiring a deposit of certificates of assessment with the Sinking Fund Commissioners of said District; and said Commissioners are hereby authorized to abolish any office, to consolidate two or more offices, reduce the number of employees, *remove from office*, and make appointments to any office authorized by law."

The court were of opinion that the Commissioners of the District were vested, by the plain reading of the statute, with

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the power to remove the plaintiff. The power is not only vested in them, but the question of removal seems to be confided entirely to their judgment and discretion, and they are consequently not responsible for its exercise to the plaintiff.

There must be judgment for the defendants upon the demurrer.

R. Ross Perry, for plaintiff.

Edwin L. Stanton, for the defendants.

JOSEPH H. BRYAN ET AL. v. WILLIAM SANDERSON
ET AL.

EQUITY.—No. 5152.

- I. When chattel trust deeds have been executed by a tenant upon his furniture after the same has been placed upon the leased premises, and a judgment creditor's bill is filed against the tenant, to which the landlord is made a party defendant, and in his answer to such bill the landlord asserts his lien for rent in arrear, and prays judgment of the same out of the funds to be realized from the sale of such furniture, it was decided that such landlord had precedence over the deed of trust, notwithstanding that he had taken no steps prescribed by the statute for enforcing his tacit lien.
- II. The tacit lien of the landlord exists independently of the methods prescribed by the statute for enforcing it; and if the property subject to such lien come into the possession of a court of equity, or of its officers, it comes into such possession subject to the lien created by the statute in favor of the landlord.

STATEMENT OF THE CASE.

This is a judgment creditor's bill, filed in aid of judgment against the defendant Sanderson, and to subject certain equities of said Sanderson to the satisfaction thereof. The supposed equitable interests arose out of two chattel deeds of trust executed by said Sanderson on the furniture in the Congressional Hotel, of which he was tenant. One of these trusts was dated 10th of March, 1875, to secure the sum of

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\$7,481.54, and the other dated March 15, 1876, to secure the sum of \$1,802.25, both payable to the order of Tobias & Co., and which deeds were duly recorded. Default in paying said indebtedness having been made, Mills Dean, the trustee, advertised the furniture for sale; and thereupon the bill in this case was filed, calling for a discovery of the amount due on said trusts, and an injunction was issued restraining the defendant Dean from selling the property until the further order of the court.

The defendant George Gulick filed his answer, disclosing the fact that he was the owner of the Congressional Hotel and landlord of said Sanderson, and claiming that the premises were rented for \$500 per month; that there were nine months' rent due and unpaid, and praying that the amount of rent then due and to become due to him as landlord of said hotel be allowed him out of the proceeds of the sale of said furniture to the time of such sale, as a first lien thereon. The trust deeds mentioned above were made and delivered upon the furniture after the same had been placed in the hotel. The balance found due Tobias & Co. amounted to the sum of \$7,980.07. On April 19, 1877, an order was made that said Dean, trustee, proceed to sell the furniture, and bring the proceeds into court. The sale was not completed until the latter part of May, and had taken place upon the premises.

On June 20, 1877, Dean reported that he had sold the goods and chattels mentioned in said deed of trust, and that the net amount realized by sale of goods mentioned in deed dated March 11, 1875, was \$4,069.96, and the said sum was not sufficient to satisfy the note held by the defendant Tobias, to secure the payment of which said deed of trust was given; and the net amount realized from sale of goods mentioned in the deed of trust dated March 23, 1876, was \$194.85. The money was paid into court. On the 20th day of August, 1877, the cause was referred to J. J. Darlington, as special auditor, to state the trustee's account and to ascertain and report the claims of the respective parties to this cause to the fund, including the claims for rent due the land-

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lords of the buildings recently occupied by the defendant Sanderson, and the legal extent of said claims; together with the legal priorities of the several parties to the fund derived from the sale of said goods and chattels.

On October 23, 1877, the auditor reported, allowing the defendant Gulick a first lien upon the fund for the rent accruing within three months immediately preceding the order of April 19 directing the sale, and also for the month current when said order was passed, amounting to \$2,000. The defendant Tobias excepted to said allowance to Gulick on the ground that Gulick had not acquired a prior lien upon the fund in court, he having taken no step under the statute to enforce a landlord's lien; and that he was not entitled to three months' rent immediately preceding the order of sale, or for a fourth month when the sale was made. On page 13 of the Revised Statutes of the District of Columbia, is the statute in regard to a landlord's lien, reading as follows:

"SEC. 677. The power claimed and exercised as of common right by every landlord of seizing, by his own authority, the personal chattels of his tenant for rent arrear, is abolished.

"SEC. 678. The landlord shall have a tacit lien upon such of the tenant's personal chattels on the premises as are subject to execution for debt, to commence with the tenancy and continue for three months after the rent is due, and until the termination of any action for such rent brought within the said three months.

"SEC. 679. This lien may be enforced—

"First. By attachment to be issued upon affidavit that the rent is due and unpaid; or, if not due, that the defendant is about to remove or sell all or some part of those chattels; or

"Second. By judgment against the tenant and execution to be levied on said chattels, or any of them, in whosoever hands they may be found; or

"Third. By action against any purchaser of any of said chattels, with notice of the lien, in which action the plaintiff may have judgment for the value of the chattels purchased

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by the defendant, but not exceeding the rent arrear and damages."

It is admitted that Gulick did not resort to the mode pointed out by the statute for enforcing the tacit lien of a landlord, nor did he terminate the tenancy by a notice to quit. And the question, so far as his claim is concerned, is whether, having requested the payment in his answer, he is entitled to it without having proceeded under the statute. There were several other exceptions, which need not be noticed.

On the 26th of March, 1878, the exceptions were overruled, and the report of the special auditor confirmed; from which order the defendants Tobias & Co. have appealed to the general term.

Ross & Dean, for Tobias & Co.

A suit at law was available to Gulick at any time after the creditor's bill was filed, because, as to him, the bill was for discovery only; and had there been an injunction, the Equity Court would have given him permission to sue at law.

The special auditor concurs in the view that Gulick's answer was in no sense a proceeding to enforce the lien, but holds that, inasmuch as the chattels were sold under the order of the Equity Court, the lien enforced itself, or did not need to be enforced.

It will be found that all decisions holding that a lien exists, independently of the means of enforcing it, are based upon statutes which established an absolute, and not a "tacit" lien. Such are the laws of Illinois, on which was based the opinion in *Morgan v. Williams*, 22 Wall., 381, and the statute of Iowa, on which the Iowa cases depend.

Had our statute given the landlord a lien without qualification, and had it not provided its own means of enforcement, the cases cited would be a guide to this court; but the lien given by our statute is silent and inoperative until called into vitality by the statutory remedy; and the act which created the lien provides the manner of enforcement.

The silent inchoate lien, which may become active and

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valid upon the use of either mode of enforcement, loses all validity if the term of its life expires and none of the prescribed steps be taken. Such we take to be the meaning of the Supreme Court in *Webb v. Sharp*, 13 Wall., 16, in which the following language is used: "The lien continued until each installment of rent became due, and for three months afterwards, and then ceased as to that installment."

James Hoban and Judson Cull, for Gulick, landlord.

1st. The said Gulick, defendant, was the "owner" of the Congressional Hotel, as proved by the evidence elicited on cross-examination of said Gulick by the solicitors of the defendant Joseph F. Tobias. (Adams Eq., 114, and notes; 2 Story Eq., sec. 1017.)

2d. The said Gulick, defendant, having in his answer requested payment of the amount of rent due and to become due to him out of the sale of the chattels of the defendant Sanderson in the said hotel, until a sale thereof, he is entitled to the amount allowed him. (See 7 Paige Ch. Rep., p. 513; *Holdane v. Sumner*, 15 Wall., p. 600; *Morgan v. Campbell*, 22 Wall., p. 390; *Barton v. Burbour*, ante, p. 212; *Joyce v. Wilkenning*, 1 MacA., p. 567.)

Mr. Justice MACARTHUR delivered the opinion of the court:

The question discussed so earnestly in this case is, whether a landlord who has been made a defendant to a creditor's bill in a court of chancery, and who has answered such bill asserting his lien and requesting payment of the amount of rent due, can thereby acquire a precedence over deeds of trust executed by the tenant upon his goods and chattels situated on the premises, without having taken any steps prescribed by the statute for enforcing his tacit lien. On this proposition we have come to the same conclusion as that reached by the special auditor. His views upon this branch of the case are so clearly expressed and so well sustained by legal principles that we adopt them, without hesitation, as disposing of the main point in controversy. He says:

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“Has Mr. Gulick, under the circumstances above set forth, a preferred lien upon the fund arising from the sale of the goods and chattels contained in the Congressional Hotel, and if so, for what period of time, are perhaps the most important questions embraced in the present reference. On his behalf it has been urged before the special auditor, that having been made a party to the bill, and having, in his answer of December 12, 1876, prayed allowance of the protection afforded by the statute for the rent then accrued as against the proceeds of any sale the court might order, and also for all rent accruing *pendente lite* previous to such sale, he is entitled to a preferred lien from the 1st day of October, 1876, when rent for the month of September became due, to the 1st day of May, 1877, about which last-mentioned date the trustee took possession under the orders of the court, as also for the month of May, until the 16th day of which month the sale was in progress; that he is entitled to such lien notwithstanding his failure to employ either of the methods of enforcing prescribed by the statute, because the bill bound the furniture from the service of process upon him, and resort to those methods would have been a contempt. The bill, however, so far as regards the defendant Gulick, having been for discovery only, neither injunction nor other relief as against him being sought, and further, the relief prayed in his answer against his co-defendants being of an affirmative character, which could be sought, if in equity at all, under the statutes, only by cross-bill, (Adams Eq., marg. p. 402,) the special auditor has been unable to concur in these views. He might at once, it is conceived, have proceeded to enforce his lien in the manner indicated in the statute; and to give to the course pursued by him the effect contended for, would place it in the power of the landlord in every similar case to utterly defeat the judgment creditor by permitting a continuing lien arising from a tenancy, which the creditor cannot terminate, to absorb the property out of which he is seeking satisfaction of his judgment. On the other hand, it has been contended, on behalf of the party

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secured by the deed of trust, first, that as a mortgagor who has parted with his reversion could not, at common law, distrain for rent, so, by analogy, he cannot acquire that lien which the statute has substituted for distress; and, in the second place, that the lien, being the creature of the statute, can be enforced only by a strict compliance with its provisions. The disability of the mortgagor to distrain for rent arose from the common-law doctrine that the legal estate vested in the mortgagee the right to distrain, being an incident of ownership. (*Penn v. Carrie*, 5 Bing., 24; *Cooper's Case*, 2 Wils., 375; *Parmenter v. Webber*, 2 Moore, 656.) But in equity the mortgagor remains the owner; and it seems unnecessary to ingraft upon the statutory substitute for distress the outgrowth of a doctrine which has long been, for most purposes, practically abrogated, both in equity and at law.

"In the second place, it is doubtless true that the lien created by the statute must be enforced, if at all, in strict compliance with its provisions. But where the disposition of the property upon which the lien exists, or of the proceeds arising from its sale, has been assumed by a court of equity, does the lien need to be enforced? It will be observed that the statutory lien differs in a material respect from its common-law prototype, the right to distraint. Under the latter, unless distraint were actually made, the landlord acquired no lien; his was an inchoate right to a lien to be perfected by distress, rather than a lien in itself. But the lien of the statute exists independently of the prescribed methods of enforcing it. Indeed, commencing with the tenancy, it exists *before* those methods have been or can be resorted to—i. e., before any rent has accrued. 'A statutory lien implies security upon the thing before the warrant to seize it is levied. It ties itself to the property from the time it attaches to it, and the levy and sale of the property are only the means of enforcing it.' In other words, if the lien is given by the statute, proceedings are not necessary to fix the *status* of the property. (*Morgan v. Campbell*, 22 Wall., 381; see, also, *Grant v. Whitewell*, 9

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Iowa, 153; *Carpenter v. Gillespie*, 10 Id., 592; *Doane v. Garrettson*, 24 Id., 355.) These Iowa decisions are upon a statute substantially the same as the statute in force in this District.

"If, then, at any time during the tenancy of the Congressional Hotel by the defendant Sanderson, or within three months after rent therefor was due, any personal chattels of said defendant, subject to execution for debt, came into the possession of a court of equity or its officer, they came into such possession subject to the lien created by the statute in favor of the landlord, or, in the language of the Supreme Court of the United States in *Morgan v. Campbell*, *supra*, with the lien 'tied to the property.' Such a lien existing by mere force of the statute, requiring no act upon the part of the landlord to perfect it, a court of equity would, in the opinion of the special auditor, regard under such circumstances without resort by the landlord to means of enforcement. 'Inasmuch as the lien had actually attached to the goods, and *could have been* enforced against them in defendant's' [a mortgagee in possession] 'hands, he had the right—in fact, *it was his duty*—to discharge it out of the proceeds of the goods.' (*Doane v. Garrettson*, 24 Iowa, 153.)

"If the above view be correct, the only inquiry upon this branch of the subject remaining is, *when* did the chattels come into the possession of the court or its officers?

"Two orders looking to the sale of the goods *pendente lite* were passed by the court, one on the 23d day of March, and one on the 19th day of April, 1877. The first merely granted to the trustee, under the deeds of trust, leave to execute the same, differing little, if at all, in effect from the order of February 21, discharging the restraining order of November 15, 1876. The second was mandatory in its character, requiring the trustee to sell forthwith and bring the proceeds into court, subject to its further order. The latter may properly be considered such a taking of the possession or custody of the goods as would have rendered it a contempt in any party to the suit to have interfered with the execution of the order, or with the possession of the trustee thereunder. The special

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auditor has therefore allowed Gulick a preferred lien upon the fund arising from the sale of the chattels in the Congressional Hotel building for the rent accrued within three months immediately preceding the date of said order, and also by analogy to the decision of the court in *Joyce v. Wilkenning*, 1 MacArthur, 567, for the month current when said order was passed.

“The only question presented in the claims of the landlord remaining to be considered is, whether or not rent, either for the entire month of May, or for the portion of that month during which the goods remained upon the premises in possession of the trustee, is payable out of the proceeds of their sale. Right to such payment could rest upon one of two hypotheses only, viz., either that the goods, notwithstanding their seizure under the order of the court, still remained so far the property of the tenant as to be liable for the indebtedness on account of rent incurred by him subsequent thereto, or else that the goods having been permitted to remain upon the premises until another month of the tenancy had been fairly entered upon, the rent for that month, or at least for the portion of it during which they so remained, is equitably payable out of their proceeds. It appears from the testimony of the trustee that he went through the houses and made inventory of the goods several days before the sale, which commenced May 3. This act of the trustee, it is conceived, was a sufficient taking of possession to reduce the goods *in custodia legis*; and if so, no lien for rent thereafter accruing could attach to them. (*Tuppan v. Moore*, 18 Johns., 1; *Thenial v. Hart*, 2 Hill, 380; *Denham v. Harris*, 13 Ala., 465; *Watson v. Hudson*, 3 Brev., 60.) The lien is a *security*; the debt is that of the tenant. Sanderson’s *tenancy* did not terminate with the seizure. The rent thereafter arising constitutes a personal liability upon him, but no longer secured by lien upon the goods which the court had taken from him and directed to other purposes. ‘Although the goods are permitted by the officer,’ *i. e.*, sheriff after levying execution, ‘to remain upon the premises until rent is due, they are in the custody of the

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law, and the lien will not attach.' (*Denham v. Harris*, supra.) Note that the cases last cited are under statutes which, though analogous, are not identical with ours."

For the reasons here stated, the order appealed from is affirmed.

JOHN WALKER AND JAMES WALKER v. THE POTOMAC
FERRY COMPANY AND SAMUEL BACON.

AT LAW.—No. 14,036.

In an action of ejectment, the plea set forth that plaintiff's title was derived through their mother, still living, who was an alien and was sister to the intestate, and that defendants claim under the heirs of an uncle of the intestate who was capable of taking real estate by inheritance. On demurrer to the plea, it was held that the heirs of the uncle had the better legal right, and that the plaintiff could not derive title by descent from an alien living mother.

STATEMENT OF THE CASE.

This was ejectment brought by the plaintiff for the possession of a certain piece or parcel of land in the city of Washington, and a count is added to recover the rents and profits. The controversy turns upon the facts alleged in the third special plea, which reads as follows:

"And for a further plea the defendants say that James Dixon, late of this District, died intestate on or about the 26th of January, 1858, seized and possessed in fee-simple of the real estate in the declaration mentioned; that the said James Dixon was a natural-born subject of the crown of Great Britain and Ireland, and emigrated from Scotland, the place of his birth, to this District on or about the year 1827, and having duly complied with the provisions of law relating to naturalization, was, on or about the 26th day of January, in the year 1839, duly naturalized and admitted to all the rights and privileges of a citizen of the United States, and that the said real estate whereof he died seized and possessed as afore-

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said was purchased by him after said naturalization; that the said James Dixon left surviving him no child or descendant; that his relatives in blood at his decease were a sister and her descendants, the plaintiffs, being children of said sister, and the descendants of a deceased uncle; that said sister was an alien, a natural-born subject of said crown, and was incapable of taking said real estate by descent, and that her said descendants, the plaintiffs, although they had been naturalized at the time of the death of said James Dixon, were likewise incapable of deriving title by descent through a living alien, (or to take because their mother, an alien, was then living,) and that the said descendants of the deceased uncle of said James Dixon were citizens of the United States, and in all respects competent to take by descent from said James Dixon; and that upon his death they entered upon the possession of said real estate, claiming title to the same in fee-simple by descent, to the exclusion of said living alien sister and her said descendants, the plaintiffs; that the title of said descendants of the deceased uncle has passed, by sundry mesne conveyances, to the defendants, and that the only claim of the plaintiffs to said real estate is founded on their capacity to take the same at the death of said James Dixon, as his heirs at law, notwithstanding their ancestor was at his death a living alien, all of which these defendants are ready to verify," &c.

This plea was demurred to, and the issue thus formed was certified to the general term to be heard in the first instance.

J. W. Moore and George H. Puschal, for plaintiffs.

Davidge & Washington, for defendants.

By the COURT:

We think that the plaintiffs cannot hold the land in controversy as against the defendants. At common law an alien could not take land by descent. The plaintiffs are nearer of kin to James Dixon, the intestate, than the heirs of an uncle, for they are the children of a sister. But that sister is an alien, and therefore incapable of taking the land by descent.

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The heirs of the uncle, though more remote in kindred from the intestate, have the better legal right. It is admitted that they can take title to land, and that they draw their title in this case through one who was capable of taking the legal inheritance. We think it is impossible for the children of a parent still alive to derive an inheritance; when the mother was herself incapable of acquiring that inheritance on account of alienage.

There must be judgment for the defendants upon the demurrer to the third plea.

GEORGE A. ARMES v. OTIS BIGELOW.

EQUITY.—No. 5319.

Where a parol contract for the exchange of lands is clearly established by the evidence, and has been fully performed by the complainant, a court of equity will compel the defendant to execute the part of such contract which still remains executory.

STATEMENT OF THE CASE.

The bill was filed January 29, 1877, to compel the specific performance of a contract for exchange of real estate, and alleges, substantially, that on November 22, 1876, the plaintiff owned house number 1252 Eighth street northwest, subject to an incumbrance of \$2,000, and agreed to convey it, subject to the incumbrance, to said Otis Bigelow; that Bigelow agreed to give him therefor house number 1138 Delaware avenue northeast, described as lot 14 in square 712, a farm in Virginia, described, and \$525 in money; that a pencil memorandum was made, signed by the plaintiff and said Otis Bigelow, showing the terms of the contract, except the description of the land, and for description of defendant's property he gave plaintiff old title deeds; that plaintiff subsequently returned this old deed of the farm to enable defendant to make the proper description in the conveyance he

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was preparing, and it is now in his (defendant's) possession, but said old deed to the Delaware-avenue property is still in plaintiff's possession; that on November 24, 1876, plaintiff, pursuant to said agreement, conveyed said house number 1252 Eighth street to said defendant, and delivered the deed, and was put in possession of the Delaware-avenue house; that on the 24th and 25th of November, 1876, defendant paid the plaintiff several sums of money aggregating \$505, as part of the consideration for said property; that defendant prepared deeds conveying said farm and said property on Delaware avenue to plaintiff, but did not execute them, naming in the deed for the house \$1,500 and in the deed for the farm \$1,000 as the consideration; that plaintiff has fully performed his part of said agreement, but defendant has failed to perform his part, except the payment of \$505 and giving possession of said property on Delaware avenue; that said memorandum was intrusted to the care of the defendant; that he tore it up, and plaintiff charges that it was so torn to hinder and defraud him of his rights in the premises.

Defendant is interrogated as to whether he did or did not give plaintiff said old title deeds as descriptive of said farm and said Delaware-avenue property, and whether he has the deeds of the farm now in his possession or control.

Prays specific performance of the contract and for an injunction; that defendant be compelled to make deeds of conveyance of the property on Delaware avenue and the farm in Virginia, or, in default thereof, for compensation; that defendant be directed to deliver into the clerk's office any and all the old title deeds he had delivered to plaintiff, as stated in the bill, &c.; that necessary accounts be taken, and for general relief.

The answer of Otis Bigelow, filed February 6, 1877, states, substantially, as follows:

About the middle of November, 1876, defendant told plaintiff he had several small pieces of real estate he would like to exchange for a large one, and showed him at least two houses for that purpose, and showed papers describing

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other property. Afterwards, on November 22, 1876, plaintiff desired defendant to enter into an agreement in writing for an exchange, and defendant refused, saying if plaintiff would examine defendant's property, and give time to examine plaintiff's property, he would give plaintiff a fair and equitable exchange. Before leaving, plaintiff wrote on a scrap of paper, which is presented to the court, the following: "Nov. 21, 1876.—I promise to give my house on Eighth street, subject to \$2,000, for one house on Delaware avenue and a farm in Fairfax county, Virginia; said house to be put in good repairs and condition, or \$650 cash," and handed the same to the defendant, who, regarding it as a very indifferent proposal, threw it under his counter; that this defendant utterly refused to make an agreement otherwise than to say, "Let us take time and make a fair trade." Denies that he gave plaintiff possession of said premises on Delaware avenue under said agreement.

On November 24, 1876, he loaned plaintiff \$5. Afterwards plaintiff besought him for an advance of five or six hundred dollars in anticipation of a possible trade. Defendant did afterwards, upon delivery of a deed in fee to him of house number 1252 Eighth street, as security for the same, loan plaintiff \$500, and though he requested defendant not to record the deed, defendant said he would record it to defend himself. Denies that he accepted said deed except as security, and has ever been willing to reconvey on payment of the loan. Did prepare certain deeds with the view of an exchange with the plaintiff, but they were not to be executed or delivered until said trade was consummated. Denies said pretended agreement as alleged. He did tear up said pencil memorandum and throw it into the waste-basket. Denies any intention to hinder or defraud plaintiff. Answering interrogatory, says all that took place in reference to the old deeds was to enable plaintiff to examine the property with a view to a sale; and he has them under his control, he thinks.

The parties were both examined as witnesses in the case. The complainant substantially made the same statements as

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in his bill, accompanied with details as to where the agreement was made, and that his brother, Charles H. Armes, was present at the conversation and heard the bargain.

In relation to the agreement he testifies:

"After discussing an hour or two in the back room of the bank, Bigelow agreed to give me for my Eighth-street house the farm and the Delaware-avenue house, and assume the incumbrance on my Eighth-street house, pay me \$500 cash, and repair the house. When that was settled he went behind the counter, and I remarked that we had better have a memorandum in writing; he said no, it was unnecessary. There was then some discussion as to whether he would allow a certain sum of money instead of repairs. I then took a pencil and wrote as follows, as near as I can remember:

"‘I propose to give my house on Eighth street, subject to an incumbrance of \$2,000, for your house on Delaware avenue and your farm in Virginia and \$500 cash, and you allow me \$150 for repairs on the Delaware-avenue house.’

"He declined, and scratched out mine and put in \$25 for repairs. Both signed it, my brother being present at the time, who read it and handed it over to Mr. Bigelow, saying he might as well keep it. I told him I would get an abstract from Mr. Morsell, and Bigelow said he would have one made of the Delaware-avenue property by Mr. Woodward, and would give me a certificate that the farm was all clear, and a warranty deed as soon as his wife returned to the city. He obtained his abstract from Mr. Woodward the next day, I think.

"Gave Bigelow deed of Eighth-street house November 24, 1876, executed by myself and wife, and told him not to record it until his wife returned; at the same time asked him for \$400, as I had a note in bank due, and he gave me the \$400, ordering at the same time his clerk to make out the deeds of his property to me, which, he stated, would be handed to me immediately on his wife's return to the city. The next day I called in and asked him if he could spare another \$100. He at once handed it to me, stating that he had completed

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my deeds, and everything was ready for his wife's signature, and handed me back the deeds to the farm and house on Delaware avenue. These deeds were in an envelope, marked 'Colonel Armes's papers.' About ten days later he asked me for the deeds to the farm; said he wanted to make some corrections. I let him have them.

"About the 11th of December I asked him for the money to repair the house. He said, 'I will give you an order on the former tenant, who owes me nearly \$50 back rent,' and that I could have the balance. Exhibit A is the order. I was unable to get the money from the party the order was on, as he said he did not owe it. I gave Bigelow no note or memorandum for the money he gave me, and nothing was said about a note or ever refunding any of said money. Had no other property on Eighth street than number 1252. Bigelow gave me the \$500 as payment of difference in the exchange of the property—the farm in Virginia and the house on Delaware avenue for the Eighth-street house. Of the \$525 which he agreed to give, I have received \$505 in cash. The \$5 was given the day the abstract was given. I conveyed to Bigelow in pursuance of the agreement. When I got the \$400 'there was nothing said in regard to any loan whatever. But as I had some money to pay out and his deeds were not ready to be delivered to me, I asked him to let me have the \$500 at once; that \$400 would do now, and I would call in to-morrow for the other hundred, and handed him my deed, stating he could have the deed in his possession, provided he would not have it recorded until his wife returned; and it was understood at the time between us both that the exchange of property was made, and that I should have the deeds for the farm and the house upon the arrival of Mrs. Bigelow.' By the delivery of deed for Eighth-street house, I meant 'that, as it was his property and the trade closed, he was entitled to it, and only trusted to his honor as to the delivery of his deeds.' I entered upon possession of the Delaware-avenue property in acceptance of part of the property, 'and he gave me the key of the house, which I adver-

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tised for rent as my property. He gave me the key and the old deed at the same time.' I repaired the house. Nothing was said about a loan when I got the \$100."

Charles H. Armes testified as follows:

"On 22d of November, 1876, went with plaintiff to defendant's office. Bigelow said he would give \$500 and the house on Delaware avenue and the farm in Fairfax county, Virginia, for the plaintiff's house on Eighth street in this city, and assume the incumbrance of \$2,000 on the Eighth-street house. Plaintiff agreed to take it, and suggested making a written memorandum. Defendant said, 'There is no use of any writings; I will do as I say.' Plaintiff in the meantime commenced writing. While writing, a discussion arose as to repairs on the Delaware-avenue house; the plaintiff wanted \$150 cash instead of repairs, and put that sum in the memorandum; but Bigelow agreed only to allow \$25 for repairs. The plaintiff then drew his pencil through what he had written about \$150 for repairs, so that the writing when signed was as follows: 'November 22, 1876.—I propose to give my house on Eighth street, subject to \$2,000, for one house on Delaware avenue and one farm in Fairfax county, Virginia, and \$525 in cash.' This was signed by the plaintiff and handed to the defendant, Otis Bigelow, who, after reading it, wrote upon it the word 'accepted,' and signed his name to it. It was agreed that the \$25 should be allowed as repairs, and nothing more should be said about repairs, and each party to do his own repairs.

"I hold the incumbrance on the Eighth-street house as attorney for the owner. The interest is payable semi-annually—January 1 and July 1. The notes were then and now long overdue. Bigelow paid \$100 interest on the notes a few days before January 1, and said he could pay the principal almost any time, but would like thirty or more days' notice. He then agreed to pay the principal in the following February. On January 27, 1877, Bigelow said he tore up the memorandum and threw it into the waste-basket, but

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that the pieces might then be in the waste-basket; it had not been emptied.

"Early in January Bigelow told me he had made out one of the deeds on a form that was signed in blank by his wife, but that, thinking such deed illegal, he had torn it up and had another made out."

John Cajay testified as follows:

"The plaintiff came to me and asked about some back rent. I told him I did not owe any. I then wrote a note to Mr. Bigelow and sent it by a boy. Getting no reply, I went in the afternoon to see Mr. Bigelow and asked him about it, and he told me he had sold the house to Mr. Armes, and that the back rent he (Mr. Armes) was entitled to as a part of the transaction. I told him I did not owe any rent; that I paid it to Mr. Merriman. Can't say definitely how long this was after I moved out of the house. It was some time afterwards—perhaps a couple of months or so."

Otis Bigelow, on his direct examination, testified that "the conversation between him and plaintiff was only with a view to a trade; that there was no trade made; that C. H. Armes was not present when Exhibit No. 1 was drawn; that the money handed plaintiff was a loan, and the deed of the Eighth-street property was given defendant as security; gave plaintiff possession of the Delaware-avenue property as agent to rent it; never gave it as owner."

On the hearing of the cause, the court below dismissed the bill, and from that decree the complainant has taken the present appeal.

Charles H. Armes and *R. H. Thayer*, for complainant.

When a parol agreement for the exchange of lands is completely executed on the part of A by his conveying the land contracted for to B, this takes the case out of the statute of frauds of Virginia. (*Carrington v. Caldwell*, 9 Peters, 86, cited and approved in 5 Otto, 458.) Such part performance is shown.

It is confidently submitted that the facts show part per-

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formance as, under the decisions in *Purcell v. Minor*, 4 Wall., 517, and *Williams v. Morris*, 95 U. S. R., 444, will entitle the plaintiff to a full and specific performance.

The contract and its terms were definite, clear, and conclusive. The plaintiff has so performed his contract that it would be a fraud on him to rescind it. The possession by each party was not scrambling or litigious, but was peaceable and was acquiesced in, and it is impossible for the plaintiff to recover back the Eighth-street house, or damages. The case is strikingly like the case in Tilton v. Tilton, 9 N. H., 386, where specific performance was decreed.

S. S. Henkle, for defendant Otis Bigelow, cited in his brief the four rules laid down by the Supreme Court in the case of *Purcell v. Minor*, 4 Wall., 513, as essential considerations to enable a court of equity to specifically enforce a parol contract respecting lands, viz.: 1st. Clear, definite, and conclusive proof; 2d. Payment or tender of the consideration; 3d. Such a part performance that the rescission would be a fraud on the other party, and could not be fully compensated by a recovery of damages in a court of law; 4th. There must have been delivery of possession made in pursuance of the contract and acquiesced in by the other party. The counsel discussed each of these points with reference to this testimony.

CARTTER, Ch. J., delivered the opinion of the court orally, in substance as follows:

All the judges who heard this cause are of opinion that the complainant has made out a case which entitles him to relief. The memorandum of an agreement prepared by one of the parties at the time of the alleged bargain, and signed by both, would be complete in its technical form if it identified the property to be given by the defendant in the contemplated exchange. Perhaps it is fair to consider this deficiency supplied by the deed containing a full description of the property on Delaware avenue, which Bigelow delivered to the complainant, in order to define the property which he

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proposed to convey; and the same remark is equally true in regard to the farm in Fairfax county, Virginia, a title deed of which had also been delivered to complainant for the same purpose.

The memorandum is in some degree informal as to the defendant's property, for it contains no description by which it can be identified; but if, in connection with the memorandum, the title deeds were delivered up as containing a full and complete description of the property offered in the bargain, is not that equivalent to a fuller memorandum? One party says: "I propose to let you have the house and lot in which I reside, on Eighth street, in this city," and makes out a deed and delivers it. The other party, in return, proposes to give a house and lot on Delaware avenue and a farm in Fairfax county, Virginia, and furnishes his titles to both, for the purpose of describing what he proposes to sell or give in exchange. This proceeding leaves nothing, in fact, vague or indefinite between the parties. But if this is at all questionable, we are still unanimously of opinion that the contract for the exchange of land by parol is clearly made out by the testimony, and that it has been performed on the part of the complainant. Aside from the testimony of the complainant and his witnesses, the acts of the parties afford convincing proof of this. The complainant made out a deed of his house and lot on Eighth street, which he delivered to Bigelow in fee-simple, which the latter puts on record. It is true he says he had it recorded as a security for the \$525 which he had advanced on account of the trade, and he asserts it was a loan. In the agreement this sum was to be paid, \$25 of it to be for repairs on the Delaware-avenue property. Not a word was said about this being a loan at the time of the advance. The money was paid on two distinct occasions. The money for repairs was drawn upon a tenant, by a written order from Bigelow, and the tenant was informed, in writing, that Armes had purchased the property, and afterwards he was informed verbally to the same effect, by Bigelow himself. Indeed, there was not a solitary budge

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that this money was advanced as a loan. No note was given or spoken of; no period of payment was stipulated for; no interest provided for, and no repayment in any manner proposed. It was not a loan, for the simple reason that it was advanced as part payment, in pursuance of the agreement, to make an exchange of lands. Bigelow went into possession of the house and lot on Eighth street, and has ever since continuously rented the same for his own use. The agreement has thus been wholly performed on the part of the complainant. Simultaneous with these acts the complainant took possession of the house and lot on Delaware avenue, repaired it, and offered it for rent, not as an agent, but exclusively in his own right. And it was at this time that Bigelow informed one of the witnesses that he had sold the property to Armes. It is also in evidence that a deed in fee-simple was prepared by Bigelow, and was not fully executed by reason of the absence of his wife from the city. He has made no tender back of the title he has received, nor of the possession of the house on Eighth street, but he holds on to all he has received, and asks the court to excuse him from rendering in return what he promised to give.

The equity appears to us to be very clearly with complainant. Conceding that the agreement was entirely verbal, and therefore within the statute of frauds, yet it has been wholly performed by the complainant; and it is now too late for Bigelow to repudiate it, and he is bound to perform what remains executory. A decree will be made compelling him to do so.

Mr. Justice MACARTHUR:

I am rather of opinion that it will be necessary in this case to refer to the testimony for the purpose of ascertaining the circumstance of a parol agreement. The memorandum does not sufficiently describe the subject-matter of the contract to take it out of the operation of the statute of frauds. "I propose to give my house on Eighth street, subject to \$2,000," is so described that it can be identified by reference to the

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circumstance that it is the only house of the party on that street. But a "house on Delaware avenue and a farm in Fairfax county, Virginia," is not such a description of property as identifies it otherwise than as being located in a certain county of a neighboring State, or on one of the avenues in this city. It does not import any particular piece or parcel of real estate that is bargained for. It does not appear what land is embraced in the agreement, and it is, therefore, too vague and uncertain, either to be the basis of a conveyance or a decree. I am, however, quite clear that the evidence leaves no doubt of a parol agreement, and that the property which was the subject of the trade was pointed out, and that each party knew of what it consisted, and where it was situated. It is in this connection that the deed relating to the farm in Fairfax county, Virginia, can be used with effect, as containing a description of the precise piece or parcel of land which was included in the sale or exchange; and the deed of the house and lot on Delaware avenue is available for the same purpose. There could be no mistake as to the property to be sold according to the terms of the verbal contract. Bigelow denies the agreement, and he undertakes to contradict two witnesses—the party who files the bill and another who was present and heard the conversation, and who states the terms of the agreement distinctly and clearly. On that occasion a memorandum was made and signed by both parties. It was afterwards destroyed by Bigelow without the knowledge of the complainant, and a circumstance of this kind raises a suspicion unfavorable to his good faith; so that he is not only contradicted by witnesses, but by his own signature. There can be no doubt of the agreement. It is unnecessary to refer to all the testimony on this branch of the case, as the chief justice has pointed it out. The conduct of the parties immediately afterwards cannot be reasonably referred to any other cause. It has been performed by one of the parties, and Bigelow has received, and is now in possession of, plaintiff's property, and proposes to keep it indefinitely. It is now too late for him to rely upon the statute

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of frauds; for a court of equity, notwithstanding that statute, will compel him to execute one conveyance after having obtained another to himself under this very agreement. It is a rule of equity, that where there is a parol agreement, by which parties thereto agree to convey lands to each other, and one of them has acquired the legal title to the lands of the other, and holds and uses the same as his own, a court of equity will compel him to perform the agreement, although it was not reduced to writing. On this principle I rest the decision of this case, and I think that all the stringent requirements prescribed by the decision in *Purcell v. Minor*, 4 Wall., 513, find their complete fulfillment in the facts and testimony of this cause.

I concur in the judgment of the court, that Bigelow should be compelled to perform.

CATHARINE V. BOUCHER v. SARAH BOUCHER ET AL.

EQUITY.—No. 4140.

- I. The application for a rehearing is by petition, and not motion. The practice in such case explained.
- II. A rehearing will be denied when the views and facts upon which it is asked were argued, fully considered, and decided at the original hearing.

STATEMENT OF THE CASE.

A decree was passed in this case August 31, 1878, and a motion for a rehearing was filed, without the previous permission of the court, on the 1st day of June following. The motion set forth two points or particulars in which the decree is alleged to be erroneous, and attached to such motion paper is an affidavit of the defendant's solicitor verifying the facts upon which it is founded. The eighty-eighth rule directs that every petition for a rehearing shall contain the special matter or cause on which a rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not

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apparent on the record, shall be verified by the oath of the party, or by some other person.

William A. Meloy, for the motion.

Mr. Justice WYLIE delivered the opinion of the court, substantially as follows:

It seems from this motion as if the practice in regard to applying for a rehearing was unsettled. This is not so. The reasons assigned for a rehearing in this case were all argued before the court, and passed upon at the hearing. No facts and no views are now presented which were not then fully considered and decided, and a simple motion is now made to rehear the case as if it were a matter of course. To show what the correct practice is upon an application of this kind, I will read from Alexander's Chancery Practice, 177, where the author says: "It must be apparent that parties cannot be permitted at their pleasure to dispute questions which the court has settled by its previous orders; and the court could not itself reconsider, and, without notice, reverse its opinions once expressed, and made the ground-work of subsequent proceedings, without great surprise, and perhaps doing irreparable injury to parties. Hence the fitness of a rule which requires nothing more than that the party shall ask permission of the court, before he questions the propriety of its judgment."

The first step for a party who desires a rehearing is to present his petition containing a statement of the special matter or cause on which he relies, according to our own rule, and obtain permission to file it. But I read again from the same book, at page 178: "The application for a rehearing is made by petition, addressed to the chancellor, stating briefly the circumstances of the case, and the supposed errors in the decree, and the grounds of the objections alleged. When the rehearing is asked for the purpose of introducing additional evidence, the petition should be accompanied by the affidavit of the party, verifying these facts, and affirming that they

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were discovered since the date of the decree, or at a time when they could not be introduced into the cause at the former hearing. The petition should be signed by counsel, or by the party. It is always in the discretion of the court to grant or refuse a rehearing."

It will be seen that a party who loses his case cannot be allowed, as matter of common right, to file a mere motion for a rehearing, and proceedings in a court ought not to be delayed by such application, unless the leave of the court is first obtained. Besides, this case has been before the court many years, and involved in expensive litigation, without profit to any one, and the view and facts used on this application have all been considered and adjudicated. The motion on its merits, as well as on the ground of its irregularity, must be denied.

WILLIAM J. MURTAGH v. DISTRICT OF COLUMBIA.

AT LAW.—14,517.

- I. The publisher of a newspaper contracted with the Commissioners of the District of Columbia to publish the tax list for said District; but before either party was called upon to perform the same, Congress changed the law under which such contract was made. There was no special agreement under the new act, and it was held that he could only recover what the work was fairly and reasonably worth.
- II. When the law requires the tax list to be published in a daily newspaper, evidence is not admissible to prove the cost of publication, composition, and distribution in a job printing office, or to prove the mere offer of the proprietor of another newspaper to publish the tax list of a subsequent year.

STATEMENT OF THE CASE.

The declaration in this cause contains the common counts, and one in *indebitatus assumpsit* for the sum of \$94,187 for printing and publishing in "The National Republican" certain tax lists for the sale of real estate in the District of Columbia,

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and for extra composition, &c. The bill of particulars sets forth that the advertising consisted of 94,187 lines, at one dollar per line. There is also a charge for extra work, and a credit by cash of \$50,000. On the trial of the cause the plaintiff proved that he offered to publish such tax list in "The National Republican," of which he was the proprietor, for one dollar per line, headings, &c., to the columns not to be charged for; and that the Commissioners of the District accepted such proposition in writing on the 5th day of February, 1875.

The contract was made under a paragraph of the fourth section of the statute of June 20, 1874, as follows:

"It shall be the duty of the collector of taxes to prepare a complete list of all taxes, and property upon which the same are assessed, in arrears on the 1st day of March next, and shall, within ten days thereafter, publish the same, with the notice of sale, in a newspaper published in said District, to be designated by said Board of Commissioners, for the time and in the manner required by the provisions of the act of the Legislative Assembly entitled 'An act prescribing the duties of certain officers for the District of Columbia, and fixing their compensation,' approved August 23, 1871." (18 Stats., 116.)

The act of the Legislative Assembly referred to in the above extract provides that the collector of taxes shall prepare a complete list of the real estate in arrears, "and publish such list *twice a week for four successive weeks*," &c. (See Acts of the Legislative Assembly, 1st session, p. 143.)

This was the law in force when the contract with the plaintiff was made.

On March 3, 1875, the above was amended "so as to substitute the word 'June' for the word 'March,' and so as to provide that it shall be the duty of the collector of taxes to prepare a complete list of all taxes, and property upon which the same are assessed, in arrears on the 1st day of June, 1875, and he shall, within ten days thereafter, publish the same, with a notice of sale, in the regular issue of a daily

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newspaper published in said District, to be designated by the Commissioners of the District, *twice a week for two successive weeks.*" (18 Stats., 419, sec. 13.)

The tax lists were not delivered to the plaintiff till June 1, 1875, and he made publication of the same, commencing on the 10th of that month, and had distributed four editions of said advertisement, and was getting the other editions, to the number of eight, ready to meet the requirements of the act of 1874, when he received a letter, dated June 23, from the Commissioners, informing him that they declined paying him for more than one-half the insertions covered by his offer of February 5, 1875. On the same day he replied, and denied that the Commissioners had any power to alter or change the agreement of that date, and that he would publish said tax list in accordance with the terms of that agreement. He thereupon continued the publications, making eight insertions, as provided in the act of 1874. The number of lines in the advertisement was 94,187, and it was admitted that he had received a cash payment thereon of \$50,000. Considerable evidence was introduced as to the value of the work. The defendant introduced evidence to show the value of performing this work in 1875 in a job printing office; and that in 1876 a proposition was made by the proprietors of "The Daily Critic" to publish the tax list of that year at the rate of 5 $\frac{3}{4}$ cents per line for each insertion. The admission of this evidence was objected to, and is now before the court on exceptions.

The plaintiff requested the court to instruct the jury that the act of Congress approved March 3, 1875, which provided that said tax lists should be published twice a week for two successive weeks, could not be held to abridge, or enlarge, or in any manner change the terms of the contract between the parties; and that if the jury should find from the evidence that the plaintiff did publish the list according to said contract, except that the publication was made in the month of June instead of the month of March, 1875, he was entitled to recover for the work at the agreed price, to wit, at the rate

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of one dollar per line. The court refused to so instruct the jury, and an exception to this ruling was the point principally discussed at the argument; it was repeated substantially in different forms and with the same result. The jury were instructed, among other prayers requested by defendant, that the plaintiff could recover under his declaration no more than his services were reasonably worth, and the plaintiff excepted.

The jury found a verdict upon a *quantum meruit*. The cause is now here upon a bill of exceptions on a motion for a new trial in the first instance.

Enoch Totten and *W. D. Davidge*, for plaintiff, argued that the contract of February 5, 1875, was perfect, and the act of Congress of March 3, 1875, could not impair its obligation; and cited *Maetier v. Frith*, 6 Wend., 112; *Taylor v. Merchants' Insurance Co.*, 9 How., 390; *Eliason v. Henshaw*, 4 Wheat., 225; *Brisbane v. Boyd*, 4 Paige, 16; *Adams v. Linsdale*, 1 B. & Ald., 681.

A. G. Riddle, for the District Commissioners.

The matter is this, and no more: The executive of the District contracted with the plaintiff for a thing to be done in the due administration of public law. Ere the thing was done, the sovereign changed the law. It was changed before any party had entered upon the execution of the thing. This change of the law destroyed the foundation of the only contract which ever subsisted—the price per line of the publication. That was at one dollar for eight insertions. The law reduced the number to four. The plaintiff still secured the job, but was remitted to his *quantum meruit*. This was the only case made by his declaration. This was left fairly to the jury.

Mr. Justice MACARTHUR delivered the opinion of the court:

After stating the case and going into an examination of the questions of law raised by the assignment of errors, he

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announced the following propositions as presenting the conclusions of the court:

1. The contract of February 5, 1875, while it remained unperformed, was subject to any legislative enactment which Congress might deem proper for the public interest. After March 3, 1875, there was no other power than that contained in the provisions of the act of that date to publish a tax list. It is conceded that no special contract was entered into under this statute. A majority of the court are therefore of opinion that the work is to be considered as being done without any special agreement, and that the plaintiff is entitled to recover what it is fairly and reasonably worth.

2. The testimony offered by the defendant to prove the cost of composition, publication, and distribution in a job printing office of a tax list like the one in question, was improperly admitted against the plaintiff's objection, and the exception thereto is sustained.

3. The testimony of defendant to prove a mere offer or proposition made in 1876 by the proprietors of "The Daily Critic," to publish the tax list for that year, was also incompetent, and the exception thereto is sustained.

These two exceptions are sustained by all the judges who heard the case, and a new trial is therefore allowed.

HUMPHREYS, J., expressed his opinion to be, that the plaintiff was entitled to the benefit of the contract of February 5, 1875, and also concurred in the decision granting a new trial for the error contained in the exceptions last mentioned.

In the matter of the application of Joseph Funk.

IN THE MATTER OF THE APPLICATION OF JOSEPH
FUNK FOR THE REISSUE OF LETTERS-PATENT
No. 184,855, GRANTED NOVEMBER 28, 1876, FOR IM-
PROVEMENTS IN LAMPS.

The deflector or jacket located between the outer wick-case and the chimney-holder in the light-house lamp, described in letters-patent No. 184,855, granted to Joseph Funk November 28, 1876, is not found in the Brandywine Shoals burner, upon which it has been rejected, and the public use of such latter lamp is no bar to a claim and patent for said deflector.

STATEMENT OF THE CASE.

Joseph Funk, of Tompkinsville, New York, obtained letters-patent of the United States No. 184,855, November 28, 1876, for certain improvements in lamps, relating particularly to that class of lamps known as Fresnel or concentric wick-burners, used extensively for the illumination of light-houses.

April 13, 1877, Funk offered to surrender his original patent into the Patent Office, and requested that it might be reissued to him in corrected form, according to the provisions of the statute. (Rev. Stats., 4916.)

Certain clauses of claim made by him in his reissue application were found to be met by the invention of one H. H. Doty, patent No. 109,303, November 15, 1870; and, upon request of the applicant Funk, an interference was declared between said Doty and himself (Rev. Stats., sec. 4904) to determine the question of priority of invention.

During this interference, the lamp which had been used for several years in the Brandywine Shoals light-house, off the New Jersey coast, was introduced in evidence, and was considered to have anticipated the substantial features of both patents. The interference was thereupon dissolved by the Acting Commissioner, and the reissue refused. Funk pursued his remedy by appeal to this court, and he here presents six claims, which are set forth in the opinion of the court.

Of these claims the first, second, and fifth had been re-

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fused by the Patent Office because of the Brandywine Shoals burner, which was thought to contain substantially the same features of construction specified in each of said claims. At the hearing, counsel for the applicant (Funk) admitted the sufficiency of the reference so far as it affected claims one and five, but insisted that claim two was for subject-matter not found therein, and for which he was justly entitled to a patent; and in this claim it will be seen the court concurred. Claim four was likewise abandoned by the appellant when the case came on to be heard, but that was because of the English patent of Farquhar, No. 727, of 1872, which had been cited as a reference in anticipation, and so need not be considered further in the present statement.

As illustrating the difference between the lamp at the Brandywine Shoals and that of Mr. Funk, the cylinder in the former which determined the air annulars external to the outer wick-case, was stationary, while the jacket or deflector of the Funk lamp was movable and capable of adjustment at varying heights above the edges of the wicks by a separate and independent movement of its own. The court, as will be seen by the decision, was of opinion that this was covered by the second claim, and was a new and useful improvement, and ordered a patent to be issued for the same, according to a claim or specification agreed upon by counsel on both sides.

C. S. Whitman, for appellant.

J. H. Peirce, for the Patent Office.

CARTER, Ch. J., delivered the opinion of the court:

This is an appeal from the decision of the Commissioner of Patents rejecting the following claims:

1. A vertically-adjustable cylinder exterior to the air-passage on the outside of the wick-case, whereby a column of air of uniform width is caused to rise in a direction parallel to the axis of the burner.

2. A light-house burner having a vertically-adjustable cylindrical deflector located in the air-space between the wick-

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tube and chimney-holder, whereby the inner current of air is thrown into the flame at its most advantageous zone, and the outer air-current is drawn up along the surface of the chimney and injected into the flame above the inner current.

3. A light-house burner having a vertically-adjustable cylindrical deflector located in the air-space between the wick-tube and the chimney-holder, and an open tube located in the central air-passage.

4. A Fresnel or concentric wick-burner having an air-passage between the outer wick-tube and the adjustable outer deflector, and an air-passage exterior to the tube located in the interior or central air-space.

5. The combination of the adjustable cylinder with the annular air-spaces on either side thereof, as and for the purposes described.

6. A Fresnel or concentric wick-burner having an air-passage between the chimney and the adjustable outer deflector, an air-passage between the outer wick-tube and the outer deflector, and an air-passage exterior to the tube located in the interior or central air-space.

At the hearing the counsel for the appellant admitted that the first, fourth, and fifth claims were substantially anticipated by a light-house burner known as the "Brandywine Shoals burner," which, it is alleged, was in continuous public use at the light-house at Brandywine Shoals during the years 1861, 1862, and 1863. It will only be necessary, therefore, to review the Commissioner's action in rejecting the second, third, and sixth claims.

The so-called adjustable cylinder in the Brandywine Shoals burner is rigidly attached to the chimney-bracket, and, if raised, the chimney-bracket must necessarily be carried with it. This would render it impossible to adjust the cylinder of the Brandywine Shoals lamp in such a way as to cause it to perform the functions of the outer deflector in the Funk burner, because, first, the raising of the chimney-bracket would raise the shoulder of the chimney which gives shape to the flame, and either modify the form of the flame, which is

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essential in light-house lamps, or, secondly, it would cause the chimney-bracket to rise so high as to cut off the rays of light from the lower part of the lens in which the burner is placed. The action of the Commissioner in rejecting the second claim must, therefore, be reversed, and in other respects his decision is affirmed.

Let there be a decree for the petitioner that the Commissioner issue a patent granting to the petitioner the following claim:

2. A Fresnel burner having a vertically-adjustable cylindrical deflector located in the air-space between the wick-tube and the chimney-holder, whereby the inner current of air is thrown into the flame at its most advantageous zone, and the outer current is drawn up along the surface of the chimney and injected into the flame above the inner current.

JAMES WELCH v. THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA AND TIMOTHY LUBEY, WATER REGISTER.

EQUITY.—No. 5120.

A lot-owner in Georgetown who uses the water from the Potomac aqueduct, is not exempt from water rates for the purpose of defraying the current expense incident to the use of such water. The United States have never entered into any contract by which the citizens of that city who use water from such aqueduct are to be forever exempt from water rates or charges, and the act of July 12, 1876, is not unconstitutional as impairing the obligation of any such contract.

STATEMENT OF THE CASE.

On the 3d day of March, 1859, Congress passed an act entitled "An act to provide for the care and preservation of the works constructed by the United States for bringing the Potomac water into the cities of Washington and Georgetown for the use and benefit of the inhabitants of the said cities."

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In and by the first section of said act it was provided that the President of the United States should designate an officer of the United States corps of engineers, to be appointed by him, who should act under the direction of the Secretary of the Interior, have the immediate care, management, and superintendence of all the works and property appertaining to the said water-works, and make report annually, in the month of November, to said Secretary. "And the said engineer shall have full power and control over the said water-works, and shall regulate the manner in which the said corporations of Washington and Georgetown may tap the pipes for the supply thereof, and shall stop the same whenever it is found no more than adequate to meet the wants of the general government; the said engineer's decisions on all questions connected therewith to be subject only to appeal to the Secretary of the Interior."

The second section of said act, among other things, gives to the corporations of Washington and Georgetown full power and authority to supply the inhabitants within their respective limits with Potomac water from the aqueduct mains or pipes, and to make all laws and regulations for the proper distribution of the same, subject to the *restrictions prescribed by this act*; provided that no expense shall devolve on the United States in consequence of such distribution.

The third section empowers the said corporations respectively to regulate the use of the water, and to fix rates of charges therefor, and to fix and enforce the collection of such rates or rents; "*provided that the rates levied by the said cities shall never be a source of revenue other than as a means of keeping up in said cities a supply of water.*"

The fourth section authorizes the said corporations respectively, in such portions as they may see fit to carry out the provisions of said act, to borrow a sum of money not exceeding the sum of one hundred and fifty thousand dollars for the city of Washington, and fifty thousand for the city of Georgetown, redeemable within a period of ten years out of any revenue to be derived from water rents.

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The sixth section provides that the expense of laying the mains to supply the said cities with water shall be paid by said cities, and the engineer aforesaid is prohibited from making any contracts unless approved by the corporation. Various provisions are made for the safety and protection of the works.

The President of the United States, in part execution of the said act of Congress, designated Captain M. C. Meigs, of the engineer corps of the United States, and appointed him superintendent of the said water-works; and on the 1st August, 1859, the same was duly transferred to First Lieutenant James St. C. Morton, of said corps of engineers.

The system adopted by the corporation of Washington to avail itself of the use of the Potomac water, under the act of March 3, 1859, consisted of laying mains for supplying the city by means of funds derived from water rates or rents collected from all those who take the water, in addition to what may be required to defray the current expenses connected with the distribution thereof. The plan adopted by the corporation of Georgetown was to defray the expense of laying the mains by a direct tax on the owners of the lots upon the streets where such pipes or mains were laid. The ordinance adopted by the common council of Georgetown for this purpose authorized the water board to issue stock of the corporation to an amount not exceeding \$50,000 to pay the expenses attending the introduction and maintenance of the water establishment, and levying a water tax of sixty cents per foot on each side of every street, lane, or alley through which the water mains pass, to be collected fifteen cents each year for four years. Captain M. C. Meigs was at that time the United States engineer of the Potomac water-works, and he was appointed by this ordinance, with the water board, to plan the distribution of the water supply through that city. On February 9, 1860, he reported in writing to the water board the completion of the work, and, among other things, used the following language:

“The total cost of the work [*i. e.*, the laying of the mains

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for distribution in said city] being defrayed by a tax of sixty cents per front foot on the lots past which the water is carried, payable in four equal annual installments, if the law is faithfully executed by the councils and the citizens, *they will, at the expiration of the four years, have water free forever.*"

The complainant is the owner of property on a street through which the water was carried, and upon which the whole of the tax aforesaid has been paid; and he has ever since claimed to be entitled to the free use of the said Potomac water without charge, save only the expense of connecting his property with the distributing main adjacent to his lot; and he insists that he is exempt from any burden, rent, or charge whatever for the use of said water. The expenses of the water supply were paid out of the general fund, so that the consumers of water in Georgetown were free of all water rents or rates by the payment thereof being provided for out of the general taxes. In Washington water rates have been provided for since the introduction of the water, by which means the expenses incurred by the use of the water have been paid.

In 1871 the corporation of Georgetown was abolished, and the collection of the taxes for the general fund have ceased, and no provision has since been made (except the act of Congress presently to be mentioned) for the payment of the expenses of the water supply of that city.

On the 12th of July, 1876, Congress, in view of these circumstances, passed an act entitled "An act for the support of the government of the District of Columbia," &c., and by the eighteenth section it is enacted as follows:

"That all laws and ordinances now in force in the city of Washington relating to the payment and collection of water taxes, water rents, and taxation for water mains be, and they are hereby, extended to and made operative over all parts of the District of Columbia where water taken from the United States aqueduct is used, and the said taxes and rents shall be payable and collectible therein in the same manner and

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at the same rate as in the city of Washington for the year beginning January 1, 1876, and for each subsequent year."

The Commissioners, in accordance with this act of Congress, proceeded to make out and render bills to the users of water in Georgetown, and among others to the defendant Welch, who refused to pay the tax assessed against him, and filed the bill in this cause to obtain a perpetual injunction against the enforcement and collection of said tax. Whether such an injunction should issue is the question submitted to this court.

The cause is certified to the general term in the first instance.

Joseph H. Bradley, for complainant.

First. There was a contract.

The second, third, and fourth sections of the act of 3d March 1859, (11 Stats., 435,) create a contract between the United States and the corporation of Georgetown when accepted by it.

They authorize the use and supply of the water for the inhabitants of that city; to regulate that use, and fix the charges therefor, and to enforce their collection; and empower the corporation to borrow money to execute this grant, redeemable in ten years, out of the water rents.

The corporation accepted the grant, but by the act or ordinance of 9th May, 1859, they adopted a plan which, it was feared, was not in strict accordance with the grants thus made; borrowed money to carry out this plan, and, instead of waiting to have that money repaid by "water rents," resolved to levy the cost at once by a specific tax on the property in front of which the water mains passed; and they submitted this plan to Congress, and Congress, by its act of 12th May, 1862, (12 Stats., 406,) approved of that plan, and it was fully carried into effect, partly by the taxes paid by complainant.

The whole amount thus borrowed was repaid out of those special taxes, and thus the corporation, for the benefit of each and every of the citizens who paid this tax, and for the pur-

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poses of the corporation, became the owner of the mains, free of any obligation to pay anything more on account of their cost.

Such is the effect of the grant, and such the terms of the contract between the government and the corporation and its citizens. (See acts of Congress 21st May, 1862; 17th June, 1864, 12th vol., 405; Revised Code, p. 24, secs. 209, 210, 211, 212, 213.)

Second. The city of Washington, on the other hand, adopted an entirely different plan. By that plan, it will be seen, there was no tax levied on the several lots in said city in front of which the mains were to be laid, so as to pay off the cost of laying said mains. That city borrowed money to defray the cost of laying the mains, from time to time as needed, to be reimbursed out of the proceeds of the water rents, as contemplated in the original act of Congress. These water rents are not assessed on the property—the *real property*—of the owners fronting on the several streets through which the mains are carried, but upon the parties using the water drawn from the said mains.

It is, therefore, apparent that if the citizens of Georgetown are taxed in the same manner, those who have paid in full for the laying of such mains in Georgetown will be subjected to a double tax: first, the interest on the money they have paid respectively for laying the mains, and second, *for the use of the water for which they have already paid.*

Third. The act of Congress of 12th July, 1876, entitled "An act for the support of the government of the District of Columbia for the fiscal year ending June 30, 1877, and for other purposes," by the eighteenth section thereof provides, in substance, that the distribution of water in Georgetown shall be subject to the same tax as is imposed on the inhabitants of the city of Washington. It is, therefore, not uniform, and is unjust and illegal, and is, as we have shown, in direct violation of a contract of the Government of the United States.

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A. G. Riddle and Francis Miller, for defendants.

It is claimed in the bill that in some way the citizens of Georgetown have secured to themselves the advantages of a contract by the terms of which they are to be forever exempt from any expense in connection with the use of the water of the Potomac aqueduct, and that this contract is of so high and sacred a character that the Congress of the United States cannot in any way impair or interfere with it. So extraordinary a claim, under the circumstances of this case, certainly ought to be based upon the clearest and most satisfactory proof of the execution, existence, and terms of such contract. But we are left in entire ignorance of all these facts. We do not know who were the parties to the contract, when or where it was executed, how it was authenticated, or what were its terms. No consideration is named for so great an exemption, and no reason assigned why the citizens of Georgetown should be supplied with water at the expense either of the United States or of the citizens of Washington.

Such a contract, necessarily extending through unlimited time in the future, must, of course, be in writing to be binding; but no writing is produced. If made by the United States or the corporation of Georgetown, it must have been made by some duly authorized agent of the contracting party; but no such authority has been or can be produced, and no evidence that such agent, if any such there was, has undertaken to make such contract.

The only pretense for such a contract that is set up seems to be an expression used by General Meigs, United States army, in a communication addressed to the water board of the city of Georgetown, under date of February 9, 1860, in which he says: "The total cost of this work being defrayed by a tax of sixty cents per front foot on the lots past which the water is carried, payable in four annual installments, if the law is faithfully executed by the councils and the citizens, they will, at the end of the four years, *have the water free forever.*" Nothing is produced to show that General Meigs had any authority to bind the United States to any such contract

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as that alleged in the bill, and probably no one would be more astonished than he to learn that out of this casual expression of his such large results were supposed to follow. In point of fact, General Meigs was not, at the date named, in charge of the Potomac aqueduct, having been succeeded therein on August 1, 1859, by Lieutenant James St. C. Morton. It appears from the statement of the water board that he (General Meigs) was then acting for them and at their request.

This claim of exemption is made in the face of the fact that the act of March 3, 1859, declares that the corporation "shall by ordinance establish a scale of annual rates for the supply and use of water apportioned to the different classes of buildings, &c., * * and modify, alter, amend, increase, or reduce such scale from time to time; * * to collect such rents when so fixed * * from the owners or occupants of all such buildings as may use the water; to stop the supply of water to any such building on failure to pay said rate, charges, or rents." In accordance with this act, an ordinance was passed April 23, 1859, providing "that any person using the water shall be subject to such water rates or tax as may hereafter be imposed by this corporation;" and this ordinance was ratified by Congress, and it has never been repealed.

The act of 1859 also provides "that no expense shall devolve upon the United States in consequence of the distribution of Potomac water." It will not be contended that the water can be distributed, the aqueduct kept in order, the whole system of the water-supply of Georgetown, including the working of the high-service pump, can be maintained without expense. The act of Congress expressly declares that the United States shall not bear that expense, and this court will not hesitate long in deciding the question whether it shall be paid by the citizens of Georgetown, who experience the benefits, or by other citizens of the District, who have their own burdens to bear.

Courts are not swift to declare an act of Congress uncon-

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stitutional, and the Supreme Court of the United States has not often ventured to do so; and surely a better case than is made by this bill must be established before this court will annul an act of the national legislature.

CARTTER, Ch. J., delivered the opinion of the court orally:

The prayer of the bill in this cause is, in substance, that the District Commissioners be restrained from carrying an act of Congress into effect. The particular section of the act objected to provides for water rates in Georgetown the same as those imposed upon the consumers in the city of Washington. The act of March 3, 1859, respecting the care and preservation of the Potomac water-works, contained a clause for bringing the water into both cities for the benefit of the inhabitants, and authorizing the corporations to make all laws and regulations for the proper distribution of the water, provided that no expense should devolve upon the United States in consequence of such distribution. They were to regulate the use of the water, and fix rates and rents therefor and enforce their collection. The city of Georgetown made such distribution and issued water stock therefor, which was paid by a direct tax upon the property on the streets along which the water mains were laid. The city of Washington incurred a debt for such distribution, which was to be defrayed by funds derived from water rates, in conformity with the act of March, 1859; and it is now claimed by the complainant, a citizen of Georgetown, who has paid the tax upon his property for laying the mains in that city, that he is entitled to the use of the water free of any rate or charge to be paid for the purpose of defraying the current expenses; and he insists that he is entitled to this exemption by reason of a contract growing out of these circumstances, and that any burden imposed by act of Congress upon him for the use of the Potomac water impairs the obligation of said contract, and is unconstitutional and void. The difficulty about this extraordinary claim is, that there is no contract, and nothing that by any possibility can be tortured into such a contract. The

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language employed by General Meigs in his report, that the citizens would, at the expiration of four years, when the mains were paid for, "have water free forever," gives no immunity from the common obligation to pay for the expenses of maintaining the supply of water, and is as far as possible from raising the solemn covenant of a contract in favor of any one as against the United States. General Meigs was not constituted superintendent of the works for any such purpose, and never imagined he was committing the government to the non-user of its taxing power for all time to come.

The laying of the mains was a provision for getting the water where it could be used; but the rates provided for in the act of 1876 are to meet the incidental expenses of keeping up the supply of water, for preserving the works from waste and destruction. The government supplied the works, and tendered to both cities, without price, all the water necessary for the use of their inhabitants. The only condition imposed in this donation was, that the corporations should discharge the cost of the distribution, and the expenses incident to maintaining the means of distribution in working order. It is just and equitable that both cities should share in this expense in proportion to the use they make of these benefits and privileges.

The conclusion of the court is that the bill be dismissed.

Wilson v. District Commissioners.

JESSE B. WILSON ET AL. v. THE DISTRICT COMMISSIONERS ET AL.**EQUITY.—No. 5589.**

By the provisions of law contained in the Revised Statutes and the act organizing the Police Court, the Commissioners of the District of Columbia are invested with authority to provide a suitable place for holding the sessions of said Police Court, and may enter into a lease of premises to be occupied for that purpose.

STATEMENT OF THE CASE.

The Police Court of the District of Columbia was established by act of Congress approved June 17, 1870. (16 Stats., 153.) The Revised Statutes of the District of Columbia provide that "the court shall be provided with a suitable place for holding its sessions at the expense of the District." The statutes also provide that the salaries of the judge and the clerk of the Police Court, and all other officers, and the fees of the marshal, shall be paid by the District quarterly, (sec. 1046,) and that the bailiffs may act as deputies to the marshal for the service of process issued by the court. (Sec. 1063.) The court may appoint the bailiffs. (Sec. 1063.) "In cases arising out of violations of any of the ordinances or laws of the District in force therein, process shall be directed to the major of police, who shall execute the same and make return thereof in like manner as in other cases," and "in cases cognizable in the Supreme Court, the process shall be directed to the marshal, except in cases of emergency, when it may be directed to the major of police." (Secs. 1065, 1066.)

It is also provided by law "that all fines, penalties, costs, and forfeitures imposed or taxed by the Police Court shall be collected by the marshal or by the major of police, as the case may be, on process ordered by the court, and by them paid over to the District"; and also that "the moneys collected upon the judgments of the Police Court, or so much thereof as may be necessary, shall be applied to the payment of the

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salaries of the judge and other officers of the court as provided in section 1046, and to the payment of the necessary expenses thereof, and any surplus remaining after paying such salaries, compensation, and expenses shall be paid into the treasury of the District at the end of every quarter." (Secs. 1079, 1080.)

The bill in this cause was filed June 2, 1877, by the complainants, residing and owning property in the vicinity of the Unitarian Church, on the corner of Sixth and D streets northwest, in the city of Washington, in which they averred that the Commissioners of the District of Columbia had made or were about to make a lease for four years for said property, to be used for the accommodation of the Police Court, with the privilege of purchasing said property at the end of that period; that such occupation would be detrimental to their interests and work irreparable injury to the property of the complainants located in the vicinity of the church, and prayed an injunction against the Commissioners of the District of Columbia. The bill proceeded upon the ground, in the first place, that the Commissioners were without lawful power to make any such lease, and, in the second place, that the establishment of the Police Court in that vicinity would amount to a nuisance; and the bill prayed that the Commissioners of the District, their agents and attorneys, might be restrained and enjoined from using and occupying the said Unitarian Church building for the purposes of holding the sessions of the Police Court, and that they and each of them, their attorneys and agents, might be restrained and enjoined from entering into any agreement of lease of said premises for the purposes aforesaid.

The Commissioners of the District of Columbia filed their answer to the bill; the trustees of the church, in whom the title of the church property is vested, were also made parties defendant in the cause, and they interposed a demurrer to the bill.

Afterwards the cause came on to be heard upon the motion for a permanent injunction, and was argued by counsel on

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both sides; and the restraining order was continued and made perpetual. Thereupon testimony was taken and filed in the cause, which was mainly directed to the question as to whether or not the establishment and maintenance of the Police Court in that locality would amount to a public or private nuisance. When the cause came on for final hearing in the Equity Court, an order was made that it be heard in the first instance in the general term.

The hearing was had without a printed record or brief, by permission of the court.

Walter S. Cox and Walter D. Davidge, for complainants.

A. G. Riddle and Francis Miller, for the District Commissioners; *Enoch Totten*, for committee of the church.

Mr. Justice MACARTHUR delivered the opinion of the court, substantially as follows:

In this cause an injunction was issued restraining the Commissioners of the District from leasing certain premises as a suitable place in which to hold the sessions of the Police Court, and the bill proceeds upon the assumption that the Commissioners have no authority to enter into a contract or to incur expense of that kind.

By the act of June 20, 1874, which changed the form of government of this District, vesting the executive power in three Commissioners, it is provided in the second section thereof that the Commissioners shall succeed to the authority of the governor and Board of Public Works, with such limitations as are afterward set forth in the act, to wit, the powers possessed by the mayor, board of aldermen, and board of common council of the city of Washington, and the corporation of Georgetown, and by the Levy Court. That act specifically provides that the Commissioners "shall make no contract, nor incur any obligation, *other than such contracts and obligations as may be necessary to the faithful administration of the valid laws enacted for the government of said District,*" &c. The Commissioners are also authorized, in addition to the

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exercise of these powers, to apply the taxes and revenues of the District. (18 Stats., 116.)

The Revised Statutes provide that a suitable place for holding the sessions of the Police Court shall be provided at the expense of the District; and furthermore, that the salaries of the judge and other officers specified shall be paid by the District. There is also a provision that all moneys arising from fines, forfeitures, and judgments in the Police Court shall be paid to the District; and in a subsequent section it is provided that the salaries of judges and other officers connected with the Police Court, mentioned in that section, shall be paid from the moneys that are thus collected, and the balance shall be paid into the treasury of the District. These are the substantial provisions of law bearing upon the subject.

The majority of the court are of opinion that these provisions of law not only invest the Commissioners with power to provide a suitable place for holding the sessions of the Police Court, but that they make it their duty so to do. The expenses of this court are charged upon the District, the payment of its officers is charged upon the District, and the Commissioners are to defray the expenses of the District by applying the taxes and revenues of the District for that purpose. And they may also make such contracts and obligations as may be necessary to the faithful administration of the valid laws enacted for the government of the District. This provision is referred to as having a direct and important bearing upon this case. The position was taken in the argument that the Commissioners were free from the burden of bearing these expenses, and therefore do not possess the authority necessary to incur them; but, inasmuch as the act says that these moneys arising from the judgments of the Police Court shall be paid to the District directly, and all of them, and afterwards directs that therefrom the expenses of this court shall be deducted and the balance covered into the treasury, we think that it clearly imposes upon them the necessity of providing for the expense of the court; and when the statute expressly declares that the accommodation for the Police

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Court is to be provided from the revenues of the District, that the power of providing such accommodations is clearly conferred upon them.

It has been argued very earnestly to the court that the marshal of the District, and he only, possesses the power to provide a suitable place for the accommodation of the Police Court. The marshals of the several districts are prohibited by law from incurring any expenditure in any one year of more than fifty dollars for rent of buildings and making improvements thereon. (Rev. Stats., sec. 830.) If a greater expense is necessary for this purpose, the marshal must first obtain authority to incur it from the Attorney-General of the United States; so that it would appear that it was merely to meet a temporary contingency, which might arise where the government had no executive except the marshal. But when the expenses of this Police Court are to be paid by the District, and not out of any general appropriation for the Department of Justice, and where the officers to pay them are authorized by law to apply the revenues and taxes of the District to that purpose, and when this is undeniably a valid law of the District, and therefore one in respect of which they may make a contract or obligation, it can hardly be said that an application of this kind could be made to the Attorney-General to defray these expenses out of the moneys of the United States specifically appropriated for his department. The people of this District have a local government which the United States have not in the different States of the Union. We have our Commissioners here; we have our local taxation from which this burden is to be discharged. So that we think the act of 1793, the provisions of which have been relied upon by counsel, has no application to a case of this kind in the District of Columbia.

It appears that the marshal of the District has never exercised any authority whatever in the selection of a place for holding the sessions of the Police Court since its organization. Previous to the establishment of the late territorial form of government, the premises now occupied by that court were

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provided by the former corporations of Washington and the city of Georgetown and the Levy Court, and the same have ever since been leased by the District authorities for the same purpose, and all the expenses connected therewith have been paid by the District, and no part of such expense has ever been paid by the United States marshal. And such appears to have been the construction placed upon the law since the court has been established. Moreover, the marshal is not the sole executive officer of that court. The major of police is to execute its process and to return the same in all cases arising out of violations of the ordinances or laws of the District, and even where cases are cognizable in the Supreme Court of the District, its process may be directed to the major of police in cases of emergency. So that many of the duties of a United States marshal in the Federal districts are locally inapplicable here. The Police Court is local to the District of Columbia, and its expenses are to be defrayed by the District, and not by the United States; and the provision of law prohibiting the marshal of a Federal district from incurring a greater expense than fifty dollars a year, is in the interest of the general government, which meets the whole expense of the Federal judiciary.

It is said the Commissioners have increased the indebtedness of the District, which they had no right to do. But this, we think, is a misconception, for the expenses of fitting up the building have been all paid out of the fund created by collecting the fines and judgments imposed by the court itself, and the rent will be paid as it always has been, out of the same fund, which is set apart and consecrated by the statute law to that very purpose. Indeed, the revenue derived from this source exceeds, by several thousand dollars every year, the expenses of maintaining the court.

We think it is an error to suppose that a Police Court is a nuisance *per se*, any more than a merchant's warehouse, or a grocery establishment, or a tailor's shop would be in the same vicinity.

It follows from these views that we are of opinion that the

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Commissioners had the power, and exercised it properly in this case, to provide suitable accommodation for the court.

The injunction is dissolved and the bill dismissed.

WYLIE, J., dissented.

JOHN T. WRIGHT v. E. PRICE WELCH, JAMES H. WELCH, ROSIA H. WELCH, HERBERT R. WELCH, AND JAMES MALONEY, LATE PARTNERS UNDER THE FIRM-NAME AND STYLE OF E. P. WELCH & CO.

AT LAW.—No. 15,085.

- I. When the court is requested to instruct the jury upon a matter in regard to which there is no testimony, the request ought to be rejected.
- II. An agent or servant who is employed at a fixed salary cannot be interested in the profits made out of articles which he sells to his employers; yet if such employers knew of his interest when they made the purchase, the vendors for whom he acted cannot escape from their contract to remunerate him.

STATEMENT OF THE CASE.

Upon the trial the plaintiff introduced evidence tending to prove that early in January, A. D. 1873, he entered into a contract with defendants to act as their agent to sell, in the territory south of the river Potomac, the right to use a patent machine, known as the "E. P. Welch & Co. middlings purifier," for a commission of fifteen (15) per centum upon amount of sales made or induced by him, and that he induced the sale of said machine to Haxall, Crenshaw & Co., of Richmond, Virginia, for use in their flouring mills, for the sum of ten thousand dollars, which was paid to defendants in the summer of A. D. 1873, and that defendants had not paid him anything.

The defendants introduced evidence tending to prove that no contract was entered into between them and plaintiff for the sale of the right to use said middlings purifier, but for

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another machine, which was not sold; that during the entire time of the negotiations for the sale of said machine to Haxall, Crenshaw & Co., plaintiff was in their employ as superintendent of their mills at Richmond, Virginia, at a yearly salary, and continued in such employ at said salary until subsequent to their payment for the right to use said machine; that his employer knew nothing about his agency for said machine, nor that he was interested in its sale, and subsequent to the sale requested defendants not to mention the fact of his receiving commission to Haxall, Crenshaw & Co.

The plaintiff further introduced evidence tending to prove that at and before the time of entering into the employment of Haxall, Crenshaw & Co., he was engaged in the business of milling, and of selling, as the agent for others, decorticators, smut mills, middlings purifiers, burr mill-stones, bolting cloths, and milling machinery and appliances generally, and that, in entering said employment, he reserved the right to continue the conduct of said business, and that some time after the sale of said machine, and before payment by them, he told Crenshaw (since deceased) that he was interested in it, but did not advise him that he was entitled to any commission or benefit from its sale.

At the close of the testimony the defendant's counsel asked the chief justice presiding to instruct the jury as follows:

"1st. If the jury find from the evidence that Haxall, Crenshaw & Co. paid plaintiff for all the superintendence and work done by him in and about putting up and running the machinery called the 'E. P. Welch & Co. middlings purifier' in said Haxall, Crenshaw & Co.'s mills, then he cannot recover from defendants fifteen per centum upon the amount of sales of said machinery.

"2d. If the jury find from the evidence that plaintiff entered into a contract with defendants for a commission to induce Haxall, Crenshaw & Co. to purchase defendant's middlings purifier for use in their flour mills, and at the time of making the contract and the entire time of its execution he

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was in the employment of said Haxall, Crenshaw & Co., on a regular salary or wages as 'head miller' or superintendent in said flour mills, and requested that said contract with defendants should be kept secret from his said employers, and it was not known to them until after their purchase of said purifier, then said contract is void." Which said justice granted with the following qualification: "Unless they further find that a reservation of his right, notwithstanding such employment, to conduct his private business, covered the right to sell such machinery on commission to them as well as other persons."

To which qualification defendants, by their counsel, excepted, and also excepted to the refusal of the court to give the instruction first asked as above.

The jury found a verdict in favor of the plaintiff for \$1,505, with interest. A motion was made upon the minutes of the justice for a new trial and overruled. The case is now here upon a bill of exception to the aforesaid instructions.

Hugh T. Taggart and Samuel C. Mills, for plaintiff.

Plaintiff's right to be "interested" does not appear to have been questioned, as it seems reasonable to suppose it would have been had such interest been inconsistent with the terms of his employment by said Haxall, Crenshaw & Co. If they recognized his right, the propriety of it can surely not be objected to by the defendants.

It does not appear from the evidence that the plaintiff had any superintendence over the work of "putting up or running the machinery called the E. P. Welch & Co. middlings purifier in Haxall, Crenshaw & Co.'s mills." On the contrary, if the agreement between said firm and the defendant is to be considered as a part of the bill of exceptions, it appears that the machine was to be put up at the cost of said Haxall, Crenshaw & Co., "but according to the instructions and under the supervision of the parties of the second part, or their millwright."

There was no foundation in the testimony for such prayer.

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The defendants could be injured in no way by its rejection, and it was properly refused. (*Greenleaf's Lessee v. Birth*, 5 Pet., 132; *Catts v. Phalen*, 2 How., 376.)

The second instruction asked was properly refused. The court was requested to arbitrarily charge the jury that the state of facts assumed, if true, constituted a bar to the action, upon the theory apparently that the contract was against public policy, and therefore void.

This would, however, depend solely upon the question whether the agreement was inconsistent with plaintiff's original employment, or involved the doing of an act prejudicial to the interests of his original employer, and it is well settled that the question whether such employments are inconsistent is one of fact for the jury. (Wood's Law of Master and Servant, 199, and authorities cited.)

The prayer, as amended, substantially placed the matter in this light before the jury.

The questions presented were clearly and plainly questions of fact for the jury, and must be considered as concluded by the verdict. (*Hogan v. Kurtz*, 4 Otto, 176.)

The judgment of the Circuit Court ought to be affirmed.

Bradley & Hine, for defendants.

It being a conceded fact that the plaintiff below was the *fac totum quoad* the mill of Haxall, Crenshaw & Co., in Richmond, Va., charged with seeing that the best machinery which could be obtained should be employed in the said mills, and receiving an annual stipend for his services, could not lawfully make a contract with defendants below to receive from them fifteen per cent. of the amount of sales of their patent, made by them to Haxall & Co., through plaintiff, as the active agent of Haxall & Co.

And they will rely on Paley on Agency, vol. 28, Law Library, pp. 15, 16, and notes; *Massey v. Davis*, 2 Vesey, Jr., 317, and notes; *Raizin v. Clarke*, 41 Md.; *Fish v. Leser*, 69 Ill.; and for the general principle, *Michoud v. Girod*, 4 How., 503, *et seq.*

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There is not in the record a scintilla of proof on which the qualification of the second prayer rested. On the contrary, it is stated in terms that this transaction was to be kept concealed from the knowledge of Haxall & Co., the employers of the plaintiff.

The proof is, that instead of coming within the category of the business which plaintiff was allowed to transact *with other persons*, and in the absence of any proof that he was to be allowed to transact such business with his employers, there is this clear proof that his interest in this purchase was to be concealed from them.

By the COURT:

When the court is requested to instruct the jury upon a matter in regard to which there is no testimony, the request ought to be rejected. This was the difficulty with the first prayer requested by defendant's counsel, and as the record fails to disclose any evidence to which it could be applied, we think it was properly refused.

Whether the second instruction ought to have been refused, or given as qualified by the court, depends upon the evidence in regard to the consent of the plaintiff's employers, that he might continue to carry on his business as an agent for the sale of milling machinery and apparatus. When he was first employed by Haxall, Crenshaw & Co., he was engaged in that business, and he introduced evidence at the trial to show that he reserved the right to continue the same on his own account, notwithstanding his employment by that firm. On the other hand, the defendants introduced evidence to show that Haxall, Crenshaw & Co. knew nothing about his agency, or that he was interested in the sale of the machine in question. Here was clearly a conflict of testimony to be submitted to the determination of the jury. And this was just what the instruction as qualified did. It may be conceded that an agent or servant who is employed at a fixed salary cannot be interested in the profits to be made out of articles which he sells to his employers. Yet if the latter knew of

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his interest when they made the purchase, the vendors certainly have no reason to complain, nor have they any right to escape from their contract to remunerate him. The instruction as qualified embodies this principle and was properly given to the jury.

New trial denied.

LOUIS HUBER AND CATHARINA W. HUBER v. FRANK
TEUBER AND BERNARDINA TEUBER.

AT LAW.—No. 14,905.

- I. An instruction to the jury should not assume that the evidence has established facts about which there is controversy and conflict of evidence.
- II. In an action for an assault and battery, the acts of both parties at the time of the transaction constitute the *res gesta*; and if these acts, on the one hand, are such as aggravate the character of the offense, they should increase the damages. If, on the other hand, they are such as show provocation on the part of the plaintiff, they mitigate the character of the act, diminish the damages in a corresponding degree, and the acts and declarations of the plaintiff at the time are to be considered for this purpose.
- III. It is erroneous to instruct the jury, that if they found the defendant acted maliciously they must give more than compensatory damages. The matter of exemplary damages is to be left wholly to the discretion of the jury. There are properly only two classes of damages in actions *ex delicto*—compensatory and those called exemplary; and compensatory damages include remuneration for injured feelings, pain, and mental suffering.
- IV. Exemplary damages cannot be recovered in a civil action for an assault and battery, when that is an offense punishable by a criminal prosecution. In such offense the damage should be compensatory only.
- V. A witness who swears to a falsehood in relation to a matter the truth of which he must have known, is not to be believed in any part of his testimony, even when the fact is not material in the case.

STATEMENT OF THE CASE.

The plaintiffs are husband and wife, and they sue jointly in an action of trespass for an assault and battery committed

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upon the person of the plaintiff's wife by the said Bernardina Teuber, who is sued jointly with her husband as defendants.

The defendants interposed a plea of the general issue, and also a plea that the alleged assault and battery was committed by the defendant Bernardina Teuber upon the plaintiff Catharina in defending the child of the defendants, to wit, Wilhelmina Teuber, from an assault, at that time, upon said child by the plaintiff Catharina Huber.

Issue was joined upon both pleas, and the cause was tried before the chief justice at the last April term of the Circuit Court. The plaintiff introduced several witness for the purpose of proving the assault upon Mrs. Huber, and the extent of the injury and suffering which she sustained, and that the blows, being four in number, were inflicted by Mrs. Teuber with the brush-end of a broom that was worn off short. The medical testimony on the part of the plaintiff was to the effect that Mrs. Huber's injuries caused great pain and were of a serious and permanent character.

The defendants gave in evidence the circumstances of the case for the purpose of showing a present provocation for the assault, by reason of the abusive language and threatening attitude of Mrs. Huber, and that the said Mrs. Huber immediately before had struck and injured the daughter of the defendant, then a child of about the age of eight or nine years. The truth of these circumstances was in controversy. The testimony is voluminous, but the brief statement now made, together with the facts referred to in the opinion, are sufficient to a proper understanding of the points decided. It is only necessary to add the instructions given to the jury at the request of the plaintiffs, and which were passed upon by the court in general term, and which read as follows:

"1. If the jury find from the evidence that Mrs. Teuber assaulted and beat Mrs. Huber, and that such assault was not in defense of her person, or that of her husband or child, she was not justified by the law in making it, and they must find for plaintiffs, and give them such damages as will compensate for the suffering endured and to be endured, the loss of health

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and strength, the increased liability to neuralgia, paralysis, and other diseases, and that in estimating such damages they are not to consider any circumstances of provocation which do not amount in law to a justification.

"2. If the jury find from the evidence that the plaintiff Mrs. Huber gave no such immediate or recent provocation to the defendant Mrs. Teuber as would have excited an ordinarily prudent person to commit an assault at the time when such assault was committed, then, in addition to compensatory damages, they will give damages for the mental pain and suffering of the plaintiff Mrs. Huber.

"3. If they find that the assault and beating was without immediate or recent provocation, and was malicious or wanton, they must, in addition to compensatory damages and damages for wounded feelings, give punitive damages."

The defendant excepted to the giving of these several instructions.

The defendant requested, among several others, the two following instructions to be given to the jury, which the court refused, and an exception was noted to such ruling:

"1. If the jury believe the assault and battery complained of in this case was wantonly provoked by plaintiff Mrs. Huber for the purpose of bringing a suit for damages against defendants, then plaintiff is not entitled to recover.

"2. The jury are instructed, as a rule of law, that where a witness testifies in respect to a matter about which he must have known the truth, and gives evidence which the jury finds he could not have been mistaken about, but which he must have known to be false, the jury will disregard his evidence in every particular."

A verdict was found in favor of the plaintiff in the sum of \$2,500, and a motion for a new trial was overruled. The case is now here to be heard upon the exceptions to the rulings above set forth.

S. S. Henkle and J. Wilson, for plaintiffs.

First exception. In this charge the jury is instructed that,

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in estimating actual damages, they were not to consider any circumstances of provocation not amounting to a justification. It seems that provocation may be considered in mitigation of exemplary damages, but not the actual damages, which in this charge are defined.

Is this good law? Our learned friends say it is not, and cite a formidable list of cases in support of the doctrine that provocation may be considered to mitigate damages generally, and that actual damages, however serious, may be reduced to mere nominal by provocation which does not amount to justification.

Of the English cases cited, but one of them (*Frazer v. Berkeley*, 7 Car. & P., 619) is a suit for damages for assault; and although the court allowed the circumstances showing provocation to be given in evidence, it is apparent, I think, that the court intended it only to be considered in mitigation of exemplary damages, although the distinction is not in terms made. The other cases, I respectfully suggest, have no bearing upon the question.

Of the thirty-one American cases cited, about one-third are suits for libel, trespass to property, and malicious prosecution. Of the remaining two-thirds, which are suits for assault, some are not in point. In some it is loosely said that contemporaneous provocation may be considered in mitigation of damages, without making the distinction between actual and exemplary damages.

The doctrine that provocation may not reduce actual damages is held in the following cases: *Watson v. Christie*, 2 Bo. & Pul., 223; *Millard v. Brown*, 35 N. Y., 297, cited by defendant; *St. Peter's Church v. Beach*, 26 Conn., 355; *Dilsbee v. Morris*, Id., 415; *Ellsworth v. Thompson*, 13 Wend., 662; *Phillips v. Kelly*, 29 Ala., 628, cited by defendant; *Keys v. Devlin*, 3 E. D. Smith, (N. Y.) 518; *Reeder v. Purley*, 41 Ill., 279; *Bernard v. Donnelly*, Id., 126; *Burchard v. Booth*, 4 Wis., 85; *Wilson v. Young*, 31 Id., 574; *Prentiss v. Shaw*, 56 Me., 427; *Jacobs v. Hoover*, 9 Minn., 204.

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R. T. Merrick and R. Ross Perry, for defendants.

The propositions of law involved in the first assignment of error are these :

1. Circumstances of provocation on the part of the plaintiff, including the injuries complained of, are to be considered by the jury in mitigation of damages generally. (*Dennis v. Rawlings*, 12 Vin. Abr., 159; *Chinn v. Norris*, 2 Car. & Payne, 361; *Frazer v. Berkeley*, 7 Id., 619; *Watts v. Frazer*, Id., 369; *Avery v. Ray*, 1 Mass., 12; *Boyton v. Kellogg*, 3 Mass., 189; *Larned v. Buffington*, Id., 547; *Child v. Homer*, 13 Pick., 503; *Lee v. Woolsey*, 19 Johns., 319; *Ellsworth v. Thompson*, 13 Wend., 662; *Collier v. Moulton*, 7 Johns., 109; *Mattheus v. Terry*, 10 Conn., 455; *Flint v. Clark*, 13 Id., 361; *Bartram v. Stone*, 31 Id., 164; *Murker v. Miller*, 9 Maryland, 338; *Gaithers v. Blowers*, 11 Id., 550; *State v. Wood*, 1 Bay, (S. C.) 351; *State v. Quinn*, 2 Mill., (S. C.) 694; *Dean v. Horton*, 2 McM., (S. C.) 147; *Barry v. Ingles*, 2 Hayw., (N. C.) 102; *Rochester v. Anderson*, 1 Bibb, 428; *Waters v. Brown*, 3 A. K. Marsh., 529; *Jackaway v. Dula*, 7 Yerg., 82; *Fullerton v. Warrick*, 3 Black., 219; *Schlosser v. Fox*, 14 Ind., 365; *Ireland v. Elliott*, 5 Iowa, 478; *Coxe v. Whitney*, 9 Me., 531; *Wege v. Westcott*, 1 Vroome, 212; *Philips v. Kelly*, 29 Ala., 628; *Dorsey v. Malone*, 14 Cal., 553.)

2. Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure. (*Finnerty v. Tipper*, 2 Camp., 72; *Child v. Homer*, 13 Pick., 503; *Bartram v. Stone*, 31 Conn., 164; *Cushman v. Ryan*, 1 Story, 100; *Robison v. Ruppert*, 23 Penn. St., 524; *Moseley v. Dunbar*, 24 Wis., 183; *Millard v. Brown*, 35 N. Y., 297.)

2d. The second assignment of error embraces exceptions numbered 2 and 3. The court, in granting plaintiff's second and third prayers, distinguished mental pain and suffering from elements of compensatory damage on the one hand, and of vindictive or exemplary damage on the other. It is submitted that these instructions were erroneous, and were

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calculated to mislead the jury. By the first instruction the jury had been informed as to the nature and extent of compensatory damages. The second instruction defines mental pain and suffering as something independent from and cumulative of compensatory damages. The third directs the jury, if they shall find malice, to give punitive damages, in addition to compensatory damages and damages for wounded feelings. The vice of these instructions is this: the damages for wounded feelings must be included under either compensatory or punitive damages. The jury may have found no malice, and therefore refused to give punitive damages. They would give compensatory damages under the first instruction; yet, under the second instruction, they would be compelled to go further, and to include an element which they had already included as compensatory, or rejected as punitive.

Mr. Justice WYLLIE delivered the opinion of the court:

This is an action in trespass for assault and battery committed by the wife of one man upon the wife of another. The husbands, however, are necessary parties on the one side and on the other, and are interested in the results. The husband plaintiff is a necessary party that he may maintain the cause of his wife, and in case of recovery of damages he may claim them as his own; and the husband defendant is a necessary party in order that he may defend the cause of his wife; and although joined, as some of the ancient authorities say, only for the sake of conformity, he is a substantial party, for he is liable to pay the damages which may be given for the tort committed by his wife. (See Comyn's Dig., Baron & Feme, letters V and Y.)

Whether the husband defendant, so joined with his wife for the sake of conformity, should be punished by vindictive damages for the malicious trespass of his wife, is a question which was not made on the trial of this cause at circuit, nor was it argued before us in the general term. Vindictive, punitive, or exemplary damages are sometimes allowable,

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not as compensation to the plaintiff for his indemnity, but, over and beyond that, as punishment of a quasi-criminal character for the wantonness and malice which inspired the wrong of the defendant. But where the damages fall upon the husband, he is the immediate and principal sufferer, although guiltless of the offense, unless it be that he must be held criminally for his failure in not having trained his wife in better manners, or for his misfortune in having a wife who was beyond his control. Neither of these considerations, however, involve malice on his part, such as in other cases may call for vindictive damages.

In *Clark v. Newman*, 1 Ex. R., 131, Pollock, Ch. B., said: "It is difficult to say that there are no cases in which the motives of the parties would be important; still I think it would be very unjust to make the malignant motives of one party a ground of aggravation of damages against the other party, who was altogether free from any improper motive."

And Alderson, B., added: "I am of the same opinion. In the case of a joint trespass the true criterion of damages is the whole injury which the plaintiff has sustained from the joint act of trespass."

It is true that in this case the joint defendants were not husband and wife. But the doctrine announced was, that where the action is joint against two, one of whom had been instigated to the trespass by wicked and malicious motives, and the other not so instigated, the measure of damages is that of compensation only.

It is not easy to imagine a case in which a joint action of trespass against husband and wife could be maintained; for if the trespass were committed by the husband conjointly with the wife, he would be alone responsible. And so is the law laid down in Comyn: "If the action be brought against husband and wife for a battery by both, and the husband is found not guilty, the action fails; for the husband ought to be joined only for conformity."

As it is not our purpose, however, to express an opinion upon this point, for the reasons already stated, perhaps quite

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enough has been said upon it for the present, and we shall regard the question as entirely open, should it come up on any future occasion.

At the trial of the cause before the jury at circuit, plaintiffs gave a considerable amount of evidence tending to prove that Mrs. Huber had been attacked and severely beaten upon her shoulders and back with the stump of a broom-handle by Mrs. Teuber, in consequence of which her health had been seriously impaired, and she had sustained injuries which caused her great suffering and which might shorten her life.

On the other hand, the defendants give evidence tending to prove that the assault and battery were by no means of an aggravated character; that the attack was provoked by the use of most opprobrious and obscene epithets employed by Mrs. Huber, and that the injurious results charged by the plaintiffs to have resulted from the battery in question were feigned and manufactured by the plaintiffs, for the purpose of making out a case for heavy damages against the defendants. The verdict was for \$2,500.

The errors assigned by the appellants consist of exceptions taken to several rulings of the court in granting or refusing instruction asked for by the counsel of the respective parties.

The first of these instructions on the part of the plaintiffs was as follows:

"That if the jury believed from the evidence that the assault and battery in question were committed by Mrs. Teuber, not in defense of either herself, her husband, or her child, they must find for the plaintiffs, and give such damages as would compensate for the suffering endured and to be endured, the loss of health and strength, the increased liability to neuralgia, paralysis, and other diseases; and that in estimating such damages they are not to consider any circumstances of provocation which do not amount in law to a justification."

This instruction was asked by the plaintiffs and granted by the court.

The instruction assumes that the evidence on behalf of the

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plaintiffs had established the fact of sufferings already endured by Mrs. Huber as the consequence of the battery complained of; that future sufferings of the same kind must follow; that loss of health and strength had been caused, and that increased liability to neuralgia, paralysis, and other diseases on the part of Mrs. Huber had been produced by the assault and battery.

These were points of controversy about which there was a great amount of conflicting testimony, and the instruction granted was well calculated to induce the jury to think that the court regarded all the plaintiffs' narrative as to the results of the battery inflicted on Mrs. Huber as fully established by the evidence. The only contingency contemplated by the instruction on which the jury were to decide, was whether the assault and battery in question had been committed in self-defense, or in defense of her husband or child. If not so committed, then the damages were to be allowed as for all the consequences enumerated in the instruction.

Another error in this instruction, as we think, is contained in the concluding clause, in these words: "And that in estimating such damages they are not to consider any circumstances of provocation which do not amount in law to a justification."

This instruction involves the question whether in an action for assault and battery acts of provocation on the part of the plaintiff short of assault, such as offensive and insulting language, or gestures on the part of the plaintiff, may be given in evidence as part of the *res gestæ* to show the real nature of the transaction, with a view of reducing damages below the point of compensation.

The instruction assumes that in no case of this character can any mere language or gestures used by the plaintiff, however aggravating, slanderous, or provoking to the defendant, deprive the plaintiff of his right to recover full compensatory damages.

Now, the term "compensatory damages" includes such as will compensate the injured party for loss of time, medical

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and other expenses, physical pain, and even mental distress. (See Sedg. on Dam., 654, note 1.)

In *Austin and Wife v. Wilson and Wife*, 4 Cush. R., 373, it was held that compensation included a remuneration for all the injuries which the plaintiff had sustained, whether a pecuniary loss or an injury to the feelings or reputation.

Is it the law, then, that a plaintiff who has employed the most opprobrious and insulting language and gestures, until he has provoked his adversary to the use of personal violence, shall never be allowed less than compensatory damages in this large sense—that is, an amount which shall remunerate him for his loss of time, his medical and other expenses, for his physical pain, his mental distress, and even for his loss of character?

It is a question about which high authorities are not agreed. In *Ellsworth v. Thompson*, 13 Wend., 663, Chief Justice Savage says:

“It is true that in some cases the law has regard for the passions and frailties of our nature. For instance, had the plaintiff, in the interview between the parties, given utterance to some abuse, whether slanderous or not; had he charged the defendant or his father with criminal or even dishonorable conduct, and had the defendant, on such provocation, assaulted the plaintiff, the act could not have been justified; yet the provocation being given at the time would have been some palliation of the offense, and the jury would have been warranted in giving small, perhaps nominal, damages.”

In 2 Greenleaf on Evidence, section 266, the subject is discussed philosophically, and the principle stated with great clearness, as follows: “It is frequently said that in actions *ex delicto* evidence is admitted in aggravation or in mitigation of damages. But this, it is conceived, means nothing more than that evidence is admissible of facts and circumstances which go in aggravation or in mitigation of the injury itself. The circumstances thus proved ought to be those only which belong to the act complained of.” And in the next section: “On the other hand, they [the jury] are to consider any cir-

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cumstances of recent and immediate misconduct on the part of the plaintiff, in respect of the same transaction, tending to diminish the degree of injury which, on the whole, is to be attributed to the defendant. Thus, if the plaintiff himself provoked the assault complained of, by words or acts so recent as to constitute part of the *res gestæ*; or, if the injury were an arrest without warrant, and he were shown to be justly suspected of felony; or, in an action for seduction, if it appear that the crime was facilitated by the improper conduct or connivance of the husband or father, these circumstances may well be considered as reducing the real amount of the plaintiff's claim for damages."

So, also, in *Frazer v. Berkeley*, 7 Car. & P., 621, it was said by Lord Abinger "that a defendant who does not deny that the verdict must pass against him, may give evidence to show that the plaintiff, in some degree, brought the thing upon himself."

The doctrine, as we understand it, deducible from these authorities, that the acts of both parties at the time of the transaction constitute the *res gestæ* and determine its character, if these acts, on the one hand, are such as aggravate the character of the offense, they should inflame the damages; if, on the other hand, they are such as show provocation on the part of the plaintiff, they mitigate the character of the act, and should, in a corresponding degree, diminish the damages.

To the extent that he has provoked the assault, the plaintiff has "brought the thing on himself." To that extent he should bear his own loss, which can be done only by reducing his damages.

On the other side of this question are *Prentiss v. Shaw*, 56 Me., 427; *Jacobs v. Hoover*, 9 Minn., 204, and *Cushman v. Waddle*, Baldwin R., 59.

We think, however, that the preponderance of authority, as well as justice and reason, compel us to the decision we have reached on this subject.

The second prayer of the plaintiffs was also granted, and

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is in these words: "If the jury find from the evidence that Mrs. Huber had given no such immediate or recent provocation to the defendant Mrs. Teuber as would have excited an ordinarily prudent person to commit the assault and battery in question, then, in addition to compensatory damages, they will give damages for the mental pain and suffering of the plaintiff Mrs. Huber."

This instruction is also liable to the objection that it assumes that mental pain and suffering on the part of Mrs. Huber had been proved by the evidence, when the existence of any such consequence had been strongly contested by the evidence for the defendants. It was erroneous in another respect, namely, that it required the jury to give the damages asked for, when it should have left that matter wholly to the discretion of the jury.

The plaintiffs' third prayer was also granted, which was as follows: "If the jury find that the assault and beating was without immediate or recent provocation, and was malicious or wanton, they must, in addition to compensatory damages and damages for wounded feelings, give punitive damages."

This instruction is objectionable in that it tells the jury they *must* give the punitive damages in the case supposed. It contains also the same errors as the first two instructions, as it assumed that the evidence had established the existence of mental suffering on the part of Mrs. Huber.

Lastly, it is objectionable in its method of classifying the damages, which it divides into three sorts: first, the compensatory; second, for the mental sufferings; and third, the punitive.

The first instruction granted was intended to include all damages of the compensatory class, and might properly include remuneration for wounded feelings and mental suffering; the second required the jury to find (in the given case) distinct damages under that decision on account of mental suffering; and the third instruction told the jury that in the case there supposed they *must* find punitive damages.

Now, there are, properly, only two classes of damages

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known in the law for such cases as this—the compensatory, and those called sometimes punitive, sometimes exemplary, and sometimes vindictive.

Under the instructions which were granted in this case it is by no means certain that double compensation for the mental suffering might not have been given by the jury, and possibly were given.

As respects the obligatory character of the second and third instructions, requiring the jury to give damages in addition to those merely compensatory, in the cases put, respectively, in those instructions, it has always been held that binding instructions of that character were erroneous. In a learned note to Sedgwick, page 466, many authorities have been brought together, in which such instructions are shown to be erroneous, and we are content at present to do no more than to refer to that collection.

In addition to these views, the case is presented in another aspect under the principle which was announced by the unanimous opinion of the Supreme Judicial Court of Massachusetts, in *Austin and Wife v. Wilson and Wife*, 4 Metc., 273. That was an action for libel by the female defendant upon the female plaintiff, and was tried before the chief justice of the Common Pleas. The damages obtained were small, and the plaintiffs carried up their case on exceptions to the charge of that court. The higher court at that time was composed of Shaw, chief justice, and of Wilder, Dewey, Metcalf, and Fletcher; and their opinion was as follows:

“We are of opinion that the jury were rightly instructed, that the damages in this case must be limited to a compensation for the injury received. Whether exemplary, vindictive, or punitive damages—that is, damages beyond a compensation or satisfaction for the plaintiff’s injury—can never be legally awarded as an example to deter others from committing a similar injury, or as a punishment of the defendant for his malignity, or wanton violation of social duty in committing the injury which is the subject of this suit, is a question upon which we are not now required nor disposed to express an

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opinion. The arguments and the authorities on both sides of this question are to be found in 2 Greenleaf on Evidence, title DAMAGES, and Sedgwick on Damages, 39, &c. If such damages are ever recoverable, we are clearly of opinion that they cannot be recovered in an action for an injury which is also punishable by indictment; as, libel and assault and battery. If they could be, the defendant might be punished twice for the same act. We decide the present case on this single ground. (See *Thorley v. Lord Kerry*, 4 Taunt., 355; *Whitney v. Hitchcock*, 4 Denio, 461; *Taylor v. Carpenter*, 2 Woodb. & Min., 1-22.)"

Undoubtedly a party charged with publishing a libel, or the commission of an assault and battery, is liable at the same time to a civil action for damages and to a criminal prosecution for his offense against the public; and this decision recognizes that principle. But in all cases where this double liability exists, the damages in the action should be compensatory only, and not punitive.

Even this rule will be found to be sufficiently latitudinous for all the ends of justice, and there should be some limit to restrain juries from running wild in the matter of damages.

Compensatory damages include such as the jury may award for injuries done to the person, for all the expenses immediately resulting from such injuries, for loss of time, for disabilities, for loss of health, for bodily pain and for mental sufferings, including allowance on these accounts for the future.

Surely these are no narrow boundaries for the range of juries in the irresponsible exercise of their fancy or their discretion. It appears to us that after damages have been computed on all these several grounds, no defendant who is still liable to fine and imprisonment by the criminal law should be further punished by the infliction of punitive damages for the benefit of a plaintiff who is already compensated, and who is no more entitled to them than any other member of the community.

Cases, however, may happen, as such cases have happened,

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where the injury done may be aggravated by wanton violation of the rights of others, by malice, or revenge without cause, resulting in a species of injury whose effects can neither be calculated nor compensated, and for which the law has provided no remedy except an action for damages. These constitute the class of injuries for which damages, both compensatory and punitive, may justly be awarded. The seduction of a wife or daughter belongs to this class.

A number of instructions were asked by counsel for the defendants, most of them the converse of those asked for by the plaintiffs, and were refused. It is not deemed necessary to refer to them particularly after the careful consideration which we have given to those of the plaintiff, except as to one only.

Much contradictory testimony had been given, and the credibility of some of plaintiffs' witnesses had been assailed by the defendants in various ways.

The instruction referred to was couched in almost the exact language of the Supreme Court, in the case of *The Santissima Trinidad*, as announced by Mr. Justice Story, reported in 7 Wheaton, 839.

The instruction was appropriate to the condition of the case on trial, and should have been granted; but it was refused.

The statement of the principle referred to has been made in very clear and concise language by Mr. Curtis in one of the head-notes to that case, in his edition of Reports, and is thus: "An immaterial contradiction of his testimony may leave a witness credible; yet if he is shown to have wilfully departed from the truth, the maxim, *falsus in uno, falsus in omnibus*, must be applied."

To constitute the crime of perjury it is necessary that the false oath should relate to some fact material to the issue in the cause on trial.

But in respect to the credit of a witness before a jury, this materiality is not essential. A witness who is discovered on a trial to have sworn to a deliberate falsehood in relation to

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a matter the truth of which he must have known at the time of giving his testimony, although the fact may not be material, yet by that act exhibits such gross insensibility to the obligations of his oath, and to truth, and such shameless hardihood in vice, as leaves no ground for judicial belief as to any part of his testimony.

SAMUEL STRONG v. THE DISTRICT OF COLUMBIA.

AT LAW.—Nos. 14,706 AND 14,736.

- I. The second rule of this court—providing that the May term of the Circuit Court shall not extend beyond the third Saturday in July, except to finish a pending trial—considered in a case where the jury had been respited and afterwards reconstructed.
- II. Where the plaintiff is allowed to amend exceptions to an auditor's report, which amendment introduced new issues, the defendant is entitled to a continuance, in accordance with the fourth section of the act of the Maryland Assembly of 1785, chapter 80, and the court is not at liberty to refuse it.
- III. When it is manifest that there has been no real trial of the issues formed by the pleadings, and that such issues were not brought to the attention of the jury, the verdict will be set aside.
- IV. Practice explained where a cause is referred to an auditor under the Maryland act of 1785, chapter 80, paragraph 1, and how the same is to be tried before a jury on the coming in of the auditor's report.
- V. The court will recognize written stipulations entered into by attorneys in regard to the conduct of a cause, and will interfere to prevent their violation by either of the parties; and a continuance should be allowed until the next term when an agreement to that effect has been entered into by the attorneys in the cause.
- VI. The competency of attorneys to enter into stipulations with one another considered, and the ultimate authority of the court in such matters recognized.

The case is stated in the opinion of the court.

Benjamin F. Butler, Matt H. Carpenter, William A. Cook, and J. Ambler Smith, for plaintiff.

A. G. Riddle and Francis Miller, for defendant.

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Mr. Justice HAGNER delivered the opinion of the court :

We have examined with care the numerous questions presented, and desire to express our obligations to the distinguished counsel engaged on both sides for the assistance they have afforded the court by their arguments. These questions will be noticed in order.

The first is the *motion for a new trial*.

The second, filed on the same day, is a motion in *arrest of judgment* upon the ground of alleged error in the admissions before the jury of evidence of services rendered by the plaintiff for the District of Columbia, in the underpinning of various private houses in the city of Georgetown. Those two motions were overruled, and they are brought up here by bill of exceptions, according to the settled practice of the court as authorized by statute.

The next motion was that *the judgment should be stricken out*, in compliance with the terms of a stipulation filed in the case.

Then follows a motion to vacate the judgment because of fraud in its obtainment. These last two motions were certified to be heard here in the first instance; and, therefore, none of the questions involved are before us, technically, upon appeal.

The plaintiff's counsel cited authority to show the care and circumspection that should be exercised by the courts in granting such motions, and their unwillingness to do so. That authority is properly applicable when the motion is made to strike out a judgment after the term has passed; but these motions were made at the term at which the judgment was rendered, and it is well understood that during the term the judgments of a court are malleable and wholly under its control, and will be moulded and corrected as may best promote the ends of justice. Courts, in acting on such motions, exercise a quasi-equitable jurisdiction, and will not hesitate to strike out a judgment which they believe is inequitable; though they are most unwilling to disturb a ver-

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dict where they can see that substantial justice has been done.

The first and second reasons assigned in support of the motion for a new trial are in these words :

“ 1st. That the court was without authority to try the case in manner and form as the same was tried.

“ 2d. For error in directing the parties to proceed in the trial of said cause in the manner and form as the same was proceeded in.”

In support of these two reasons several objections to the verdict have been presented for our consideration.

The first is addressed to the constitution of the jury. Was that jury, as it was constituted, authorized to render a verdict in this case on the 5th of October, 1878 ?

By the second rule of this court it is declared that the May term of the Circuit Court commences on the second Monday of May, “ which term shall not continue beyond the third Saturday of July, *except to finish a pending trial.*” The third Saturday of July, 1878, was the 20th of that month.

It appears that on the 17th of July this case was called and a jury of twelve from the May panel was sworn, and the jury was then respited until Tuesday, the 10th day of September, and the rest of the May panel were discharged.

When the court reassembled in September eleven of these jurors responded when called. James E. Rogerson, the twelfth juror, was excused from further service on the jury, and from three talesmen then summoned by the marshal another juror was sworn in his place, and on the next day another of the May jurors was excused, and a new juror selected from three talesmen was sworn in his place, so that the jury, as finally formed, consisted of ten of the May panel and two taken from the talesmen. It is worthy of remark that there was no *striking* by the parties, the court directing the clerk to swear the first of the talesmen on the list. The court then ordered that each of the jurors should be called and *sworn separately*, and they were sworn accordingly.

Now, was there a “ pending trial ” on the third Saturday

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in July, within the meaning of the rule? The only feature of a "pending trial" appearing on that day was the fact that a jury from the May panel had been sworn in the case. But that jury then impaneled did not try this case, although ten of the persons who constituted it were among the twelve persons who were impaneled and sworn afterwards, on the 11th of September, 1878, when it may well be questioned whether the only feature of a "pending trial," existing on the third Saturday of July, had not then disappeared.

The court, under this practice, could equally in turn have excused every juror of the May panel and supplied their places successively from talesmen, and the jury would then have been constituted without a single member of the May panel. And admitting that the jury as impaneled would have been a lawful one, and that the mere swearing of a jury fulfilled the condition of the rule as to "a pending trial," still, as this swearing of the jury took place on the 11th day of September, it could scarcely be considered as proof of a pending trial on the third Saturday of July.

For these reasons we are constrained to express very grave doubts whether that jury was competent to proceed to the trial of that case in September, 1878.

The case then came on to be heard on the defendant's motion to strike out the plaintiff's exceptions to the auditor's report, and some of them were stricken out and others retained; whereupon the plaintiff moved for leave to file exceptions.

This motion was denied, and the jury was respited till the next day, and on that day was again respited to the 16th of September. On that day the plaintiff, *with the consent of the defendant*, moved the court for leave to withdraw a juror and continue the case, "and the same having been heard said motion was refused." And thereupon the court ordered that its ruling as to the plaintiff's leave to file his amended exceptions be set aside, and leave was granted the plaintiff to file them, and they were filed. The defendant thereupon *moved for a continuance, which was refused, and the court ordered*

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that the trial proceed, and the jury were again respited until the next day.

In our opinion this refusal of the court to allow the continuance was error.

The exceptions to the auditor's report formed an exceedingly important part of the pleadings, and here were new exceptions filed, new issues introduced into the cause, which were not part of it at the time the jury had been impaneled to try the case "upon the issues joined" at the time they were so sworn. For the filing of those new pleadings necessarily involves new and different issues. The defendant insisted that the court should have allowed this continuance in accordance with the fourth section of the act of Maryland of 1785, chapter 80, which reads as follows:

"IV. *And be it enacted*, That the courts of law shall have full power and authority to order and allow amendments to be made in all proceedings whatsoever before verdict, so as to bring the merits of the question between the parties fairly to trial. *And if amendment is made after the jury is sworn, a juror shall be withdrawn*, and in all cases where amendments are made the adverse party *shall have time allowed*, in the discretion of the court, to prepare to support his case upon the state of the proceeding so amended, and such costs shall be allowed the party against whom such amendment may be made as the court shall think just."

In our opinion the requirement in this section, that "a juror *shall be withdrawn*" where "amendment is made after the jury is sworn," is *mandatory*, and the party against whom the amendment is made has an absolute right to a continuance in the case referred to, which the court is not at liberty to refuse.

And we also think that the words in the next paragraph, "in the discretion of the court," refer only to *the extent of the time* to be allowed by the court, and that the requirement that "*time shall be allowed*" is just as mandatory in its character as is that in the previous paragraph. That this is the proper construction of the section, is made clear from an ex-

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amination of the Maryland act of 1809 amending the act of 1785, which repeals this fourth section and substitutes for these mandatory requirements the provision that the continuance shall not be made unless the court shall think it necessary for the ends of justice, showing that it was considered necessary to change the original act before the judge could exercise any discretion as to granting the continuance. But we are to be governed by the original and not by the amended statute.

We think, therefore, as the juror should have been withdrawn, and the defendant had an absolute right to the continuance, it was error in the court to refuse the motion; and although it was in the discretion of the court to say for how long a time the continuance should be granted, yet it was not clothed with an unlimited power in the matter, but with a judicial discretion, the exercise of which would have been the subject of review if abused.

On the 17th of September the court respited the jury until the 24th, when both the counsel of the defendants and Mr. Totten, of counsel for the plaintiff, withdrew from the case. On the next day the plaintiff and Mr. Cook, his attorney, appeared, and the hearing of the case commenced and was proceeded with (no counsel appearing for the defendants) until the 5th day of October, when the jury rendered a verdict for \$133,000 in favor of the plaintiff.

The next point is as to the state of the pleadings. There are two cases, and the same pleadings, with one exception, are found in both. In one case the third plea avers that there had been a voluntary submission by the plaintiff to the Board of Audit of that particular claim, and that the board adjudged and determined that Strong had been overpaid on that claim \$21,270. In the other case the third plea avers a similar submission, and that the Board of Audit found that about \$10,000 was due Strong, for which a certificate had been duly issued. There were other issues and pleadings, including limitations by the defendant to the plaintiff's claim, and by the plaintiff to the alleged award and satisfac-

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tion, and also a demurrer designed to raise a question as to the power of the Board of Audit, &c. Finally the pleadings as to the alleged submissions stood upon the replications by the plaintiff that he did not agree to this submission to the board.

Upon these replications issue was joined, and a stipulation was signed by all the parties, agreeing that the Board of Audit did act upon the claims of Strong and did issue the certificate for \$10,000, and it was further agreed that this stipulation should be filed in the two cases. The pleas of limitations by the defendants to the plaintiff's claim, and by the plaintiff to the defendants' plea of satisfaction, were evidently interposed upon the belief, on the part of the plaintiff and defendants, that the statute was a bar to the respective claims and counter-claims therein objected to.

We must assume that they were put in for a purpose and in good faith, and yet the case, as conducted by the plaintiff's counsel alone, was placed before the jury without the slightest reference to either of these defenses. It is also admitted that no reference was made before the jury to the defenses as to the action of the Board of Audit, or to the stipulation on the subject on file in the case; and it is conceded that none of these questions, thus distinctly raised by the pleadings, were in any manner brought to the attention of the jury who were impaneled to try the issues joined. It is, therefore, manifest that as respects these various questions, involving considerations of the utmost importance to every tax-payer of the District, there was practically no more a real trial of the issues involved than if it had been a case for the most trivial case before a court of *pie poudre*. It was rather a travesty of a trial or an *ex-parte* inquest.

There is another peculiar feature in the case which shows clearly, we think, that by an inadvertence, certainly an excusable one under the circumstances, the pleadings in the cases, after the return of the auditor's report, were not properly made up under the act of 1785, chapter 80, section 12, under which the cases were referred to the auditor.

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I received last night a copy of the opinion in an unreported case recently decided in the Court of Appeals of the State of Maryland involving the consideration of this Maryland statute. The opinion was delivered by Judge Miller, one of the ablest and most painstaking judges of the court, in the case of *Wisner v. Wilhelm*.

In this case, which was a suit in assumpsit, the plaintiff filed a bill of particulars of items running over ten years. The defendant filed a set-off; the issues were joined and the jury sworn, when the judge, without the assent of either party, referred the case to an auditor. The auditor proceeded to take testimony, and filed his report to the court, showing a balance of some hundreds of dollars due the plaintiff. When it came in the defendant objected to the report, but the court overruled the objection and gave judgment for the amount of the auditor's award. The plaintiff then moved the court to strike out the judgment for error in entering the same, and the court granted the motion; and at a subsequent term a jury was sworn, the case tried upon the issues raised by the previous pleadings, and a verdict rendered for the plaintiff. The defendant's exceptions were taken to the court, allowing the plaintiff to prove his claims by producing the auditor's account and report to the jury, and to its refusal to allow the defendant to give any proof of his set-off before the jury, or to controvert any item of the plaintiff's account.

I will read some portions of the opinion, which, as the decision of the court of highest jurisdiction of the State of Maryland, whose statute is under examination, is entitled to the respect of this court as an authoritative construction of the law:

"The questions raised by the exceptions taken at the last trial involve the validity of the court's order appointing the auditor, and his action thereunder. It is to be observed that this was not a reference by rule of court and consent of parties under article 7 of the code; but the court's action was based upon section 9 of article 29, which is a transcript of the twelfth section of the old act of 1785, ch. 80. We

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quote the latter, and the provision is: 'That in all actions brought or hereafter to be brought in any court of law of this State grounded upon an account, or in which it may be necessary to examine and determine an account between the parties, it shall and may be lawful for the court where such action may be or remain for trial to order the accounts and dealings between the parties to be *audited and stated* by an auditor or auditors to be appointed by such court, *and there shall be such proceedings thereon as in cases of actions of account.*'

"We are not aware that this statute has ever been construed by the Court of Appeals, and the only reported case we know of in which it has been attempted to be put in force is that of *Mmtz v. Collins*, 4 H. & McH., 65, tried in the General Court in 1797. That was an action of debt on the bond of a deputy sheriff and collector appointed by the sheriff, who was the plaintiff in the action, by which the deputy agreed to account to the sheriff as often as he might be required for all money and tobacco he may or ought to have received and collected as such deputy. After pleas of general and special performances, the court, on motion of the plaintiff, appointed auditors under this law, who acted and made their report; but the court quashed it on motion of defendant, Chase, J., saying: 'The court are of opinion that on the order to appoint, and the appointment of auditors under the act of Assembly, there *must be the same proceedings as in cases of actions of account.*' After this the case was tried before a jury in the usual way, upon issues regularly made up by the pleadings. From this opinion of Judge Chase it does not clearly appear for what reason the report was quashed; but, in the argument in the Court of Appeals by Mason and Shaaff, for the appellant, it is said: 'The court in this case admitted the necessity of proceeding according to the action of account, and they quashed the proceedings of the auditors *because they gave no day to the party.*'

"The report, however, states, 'that in pursuance of the within appointment, *in the presence of the parties plaintiff and defendant, who attended for the purpose,* we received, heard, and

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determined the accounts between them, as by an account stated, and hereunto annexed, will show and explain.' If the ground of the court's action in quashing this report is correctly stated by counsel, it shows with what technical accuracy such proceeding must be conducted. From that time to the present there is no reference in our reports to this section of the act of 1785. This has probably resulted from the facts, first, that in practice the more expeditious and less cumbersome mode of procedure respecting the reference of causes to referees or arbitrators provided for by the act of 1778, chapter 21, section 8, &c., codified in article 7 of the code, and by the statute of 9 and 10 William III, chapter 15, still in force in this State, (*Shriver v. The State*, 9 G. & J., 1,) has been generally adopted; and second, because actions of account at common law, or under the statute of 4 Anne, chapter 16, section 27, have in recent times been in a great degree, if not entirely, superseded by resort to a court of equity, where litigants and the profession have found the remedy more convenient and expeditious. There are some cases in which this action has been recognized as still in force in this State, but this recognition is accompanied with the statement that it is nearly obsolete and has been seldom used. In fact, we can find but one instance in which it has been actually resorted to in our courts, and that is the case of *Perkins v. Turner*, 1 H. & McH., 400, tried in the Provincial Court in 1771, more than a century since. The attempt, however, of the court below to apply the section of the code to the plain and simple case before them, has brought us back to some of the almost forgotten learning on the subjects of actions of account at common law and the proceedings in them.

"It may be gathered from the decision in *Mantz v. Collins*, as well as from the terms of the section itself, that it extends and can be applied to some other cases than those in which an action of account at common law would lie. We shall assume (though we are far from so deciding) that it could be applied in this case. But if applied it is clear its require-

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ments must be met, for it expressly provides that after the auditors are appointed 'there *shall be* the same proceedings thereon as in cases of actions of account.' This means, at least, that the proceedings by and before the auditors must be the same as in actions after judgment *quod computet* is rendered; and what are they? In 1 Bacon's Abridgment, title ACCOMPT, letter F, we find the law on this point succinctly but completely stated thus:

"In an action of accompt there are two judgments; the first is *quod computet*; after which the court assigns auditors, usually two of the officers of the court, who are armed with authority to convene the parties before them *de die in diem* at any place they shall appoint till the *account* is determined. The time by which the account is to be settled is prefixed by the court; but if the account be of a long and confused nature, the court, on application, will enlarge the time. If either of the parties think the auditors do him injustice he may apply to the court, *and if the defendant deny any article or demurs to any demand, it is to be tried and determined in court.*' So in 1 Comyn's Digest, title ACCOMPT, it is said: 'Before the auditors the defendant may plead, and the plaintiff or defendant may join issue or demur upon the pleadings, which *shall be certified to the court and there tried or argued.*' And again: 'If the defendant plead before the auditors any matter in discharge which is denied by the plaintiff, *so that the parties are at issue*, the auditor must certify the record to the court, who thereupon will accord a *venire facias* to try it.' And the form of such certification by the auditors of the issue made up before them, and the award of a *venire* for a jury to try it, is found in 2 Harr. Ent., 182.

"From these authorities it is plain there are some questions of *fact* and issues of law which auditors have no power to determine, and which must be tried before the court and by a jury, and that the right of trial by jury of such questions of fact was carefully preserved by those who framed and applied these common-law proceedings. The auditors may investigate the items of the account *by examination* of the

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vouchers, and then perform the ministerial duty of stating it, and by statute 4 Anne, chapter 16, section 27, they are 'empowered to administer an oath and *examine the parties* touching the matters in question.' But we nowhere find they have any power to examine *other witnesses* and try all the questions in dispute on testimony thus taken, as if they were a jury regularly impaneled for that purpose.

"Here the court's order, in effect, empowers the auditor to do that very thing, and his report shows that he did it. Issues had in fact been made up by the pleadings which required the plaintiff and defendant each to prove the several items of his account, and by which the correctness of each and every one of the items contained in the two bills of particulars was disputed and denied, and a jury was actually sworn to try these issues. The court then discharged this jury, and, without consent of the parties, *delegated this power of trial* to an auditor. We think no case can be found in which proceedings in an action of account would justify such an order or such action by the auditors, and we are very clearly of opinion this section of the code does not authorize them. In fact, if it were susceptible of being so used, and of the construction contended for by the appellee, it would be in conflict with the sixth section of article 15 of the Constitution, which declares that 'the right of trial by jury of all issues of fact in civil proceedings in the several courts of law in this State, where the amount in controversy exceeds the sum of five dollars, shall be inviolably preserved.'

"We have, therefore, no hesitation in pronouncing this order of the court and the action of the auditor thereunder invalid and of no effect.

"But apart from this, the appellee, by his own action in the case, has precluded himself from relying upon this order and report. At his instance the judgment on the report (which an action of account is the only one in favor of the plaintiff that can follow the judgment of *quod computet*) was stricken out, and at his instance 'a trial of the case' was granted, and a new jury sworn. This second jury was sworn

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to try the issues joined in the pleadings, and he could no longer avail himself in that trial, which he thus sought and obtained, of what had been done by the auditor. In that trial the report of the auditor, so far from being conclusive of what is stated, was mere hearsay, and wholly inadmissible in evidence."

It appears from all this very clearly that the issues raised by the exceptions to the auditor's report, in the cases at bar, were the real substantial issues which were properly for trial before the jury. It was, of course, quite competent for the counsel on both sides to agree that the testimony before the auditor should be read to the jury, and also that the case should be tried upon the previous pleadings, irrespective of the auditor's report. But no such agreement was made, nor was there any order of court setting aside or quashing the audit. On the contrary, it appears that there were exceptions taken to it on both sides; and hence the trial should have proceeded before the jury upon the issues raised by the exceptions to the report, and not upon those raised upon the antecedent pleadings.

We think, therefore, there was error in this respect, as to the mode in which the inquiry was conducted before the jury.

4th. Another ground of exception to the court's refusal to continue the case involves the consideration of the effect and force of the stipulations for a continuance entered into by the counsel of the parties.

The attorneys of the court are officers of the court. They form its right hand, and the court, as a judicial body, can no more act efficiently without their faithful co-operation than the physical body can act effectively without the aid of its members.

They act before the court under the highest sense of professional obligation, subject at all times to the summary control of the court for any departure from the proper line of professional duty.

It is an every-day thing for counsel to enter into stipula-

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tions with one another, and until it appears that such agreements are beyond the competency of attorneys, and are in opposition to the course of public justice, undoubtedly the court will recognize them, and interfere to prevent their violation by either of the parties.

Take, for instance, the case at bar. Suppose a stipulation had been entered into that the case should not be tried, and that at the very moment the plaintiff was summoned, as we have heard, to the bedside of his dying wife, himself and his witnesses absent, and his counsel unprepared to try his case, the counsel of the defendant should have insisted upon proceeding with the trial, would it have been tolerated by the court that the defendant should be allowed to press the case to trial under such circumstances?

The language of the stipulation, to be found on page 36 of the record filed in the case by the attorney, is:

"It is, this 13th day of September, A. D. 1878, mutually agreed and stipulated that a juror may be withdrawn, and that said causes (as consolidated) may be continued until the next term of this court."

This paper was properly before the court, and it cannot be contended that it contained anything indecorous or extraneous, and, in our opinion, when it was brought to the knowledge of the court the case should have been continued.

The court cannot admit that there was any power in either of the attorneys, nor in either of their principals, to withdraw from their stipulation against the consent of the other.

The power of the attorney to bind his client by stipulations in the conduct of the case is settled by a multitude of cases; but we will refer to one case, not cited at the bar, showing the extent to which this principle is recognized by the courts. We refer to the case of *Kent v. Ricards*, 3 Md. Ch. Rep.

The facts of the case were these: Ricards held a large claim against Kent, which he placed for collection in the hands of an attorney, who recovered judgment against Kent. Shortly afterwards the attorney disappeared. When the plaintiff learned that his case had been deserted, he employed

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another attorney, who found the judgment on the docket unsatisfied, and that no execution had been issued.

By the imperative orders of the plaintiff, the second attorney ordered execution to issue. Mr. Kent then came in and filed a bill for an injunction, alleging that soon after he was sued he had delivered a large amount of collaterals to the first attorney, with a distinct agreement on his part that no recovery was to be had against him in the principal case until the collaterals should have been collected, and all that could be realized from them applied to the payment of his debts; that after he found that a judgment had been rendered he remonstrated with the attorney, and would have proceeded to have it stricken out, except that the attorney promised that no execution should be issued until the collaterals had been collected, and that the attorney had collected large sums from the collaterals which Kent claimed should be credited on the judgment. The defendant answered that he had never heard one word about these arrangements until he read the bill. He had no communication with his attorney on the subject, and if the latter had made any such arrangement it was without his authority; that he had received no money from the collaterals, and that neither he nor his present attorney had any knowledge of the matters charged in the bill, and he submitted to the court whether he should be held at all responsible for the unauthorized acts of the attorney. Chancellor Johnson decided that the facts charged justified the granting of an injunction to restrain the enforcement of the judgment until the collection or ascertained insolvency of the collateral, and that the fact that Ricards had given no authority to the attorney to enter into the arrangement, and had no knowledge of his acts until the bill was filed, did not entitle him to repudiate his attorney's agreement. In the course of his opinion he held this language:

"It was decided by the Court of Appeals in the case of *Henck v. Todhunter*, 7 H. & J., 275, that, by the law and practice of the courts of this State, a party might appear either in *propria persona* or by attorney; and whenever the appear-

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ance of an attorney is entered on the record, it is always considered that it is by the authority of the party, and whatever is done in the progress of the cause by such attorney is considered as done by the party and binding upon him; and whether the attorney is faithful to his trust or not, is a matter between him and the party, his client, to whom he is responsible for the faithful discharge of his duty."

These stipulations are recognized in the rules of this court, with the single provision that they shall be in writing before the court will take notice of them. They effect an immense saving of time and costs by the admission of facts. In making them the counsel are conclusively presumed to act in behalf and by the authority of their clients, and whatever is done by them is esteemed the act of and binding on their clients, with the exception that an attorney cannot compromise a case, take a bond for the debt, or anything less than payment, without the authority of the client. We think there is no earthly objection to the stipulation first signed by the attorney, and that the parties, plaintiff and defendant, were bound by it, and that they should not have been permitted to repudiate it.

There is another stipulation, however, to be found in the record at page 38, signed as well by the plaintiff and defendant as by their respective attorneys, under their seals, in condemnation of which a great deal has been said in the argument by the plaintiff's counsel.

It is insisted by the plaintiff's counsel that it contains features of so improper character that they nullify and render nugatory whatever benefit the defendant might otherwise have derived from it. It has been urged that it is disrespectful to the court, and that the natural effect of such stipulations is to wrest the conduct and control of the causes from the court and lodge it in the hands of the attorneys.

It is worthy of remark that this stipulation was not introduced to the court's attention by the attorneys, and was not designed to be presented to the court, but that it appears here by the act of the plaintiff himself, and is on file by the order

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of the court. Even if it be the fact that, if examined, some portions of it might be liable to some of the criticisms urged against it, yet it is obvious that parties might make agreements with each other *outside the case*, and yet concerning it; as, they may write letters to each other about their cases, which might be quite unsuitable to be introduced in the case, but which, if it appears that they were not designed to be brought to the attention of the court, it would seem unwise and unnecessary to visit with censure should they happen to be brought unintentionally to its notice.

With respect to the suggestion that to withhold censure of the features alluded to in this stipulation would be to encourage attempts to take the management of the business of the court out of its control, we may remark that we have no apprehension that any such improbable attempt will be made, and the danger is rather imaginary than real. It is enough to say that if it ever should be made the court will be prepared to meet it.

The laws impose upon this court the final responsibility as to the order of business; but when these stipulations are made by counsel or parties and acted upon by the court, they become the act of the court.

But surely the best way to discharge the possibility of such a contingency would be for the court to show to the attorneys that they regard them as gentlemen whose word is sacred when once pledged, and that they will always expect and require from them the utmost good faith—*uberrima fides*.

Here were two important cases, in which upwards of \$400,000 was claimed, affecting the interest of almost every man in this District. A very large verdict was recovered. Whether or not that amount was properly due, of course is not for us to decide.

Most important questions were involved, and either party, if he knew the trial was properly about to proceed, would naturally fortify himself by timely preparation of the law and facts, would secure the attendance of his witnesses, and

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make all preparations commensurate with the importance of the case.

The counsel for the defendant were induced by force of these stipulations to believe, and had a right to believe, that the cases would not be pressed, and they were, therefore, altogether unprepared to go on with the trial.

Under these circumstances the conduct of the plaintiff in insisting upon the repudiation of the stipulation which he himself had signed after it had been prepared by his own counsel, and in openly stultifying himself by insisting he did not understand the effect of his own act under seal, operated a legal surprise, to say the least, upon the defendant.

In our opinion, for this court to sustain a verdict obtained under such circumstances would be a reproach and scandal to the administration of justice.

There are other very important questions involved in this case, which are distinctly raised by the bill of exceptions. One is as to the liability of the District of Columbia to pay for the underpinning of private houses in Georgetown. Another, of greater importance still, is whether or not the plaintiff was entitled to credit the so-called "certificates of indebtedness" at their alleged market price, instead of their face value. A large part of this claim—some \$70,000—appears to depend on this question.

There may be a multitude of cases of a similar character growing out of the claims of the hundreds of contractors who have had dealings with the city government. Now, if these important questions were at all discussed before the court at the trial below, they certainly were not discussed by counsel for the defendants, and, therefore, so far as they were concerned, they went *sub silentio* before the court and jury. We might decide upon them now, but, as the argument before us was confined rather to other points, we shall forbear to express an opinion upon them, preferring that they shall be properly argued on the new trial below.

We have noticed all the questions which we think it important to decide here, and we decline to enter upon the

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consideration of any other matters not involved in the merits of the case.

One word more. It is always within the discretion of the court, in awarding a new trial, to grant it upon terms; and the apportionment of the costs is a familiar mode of exercising that discretion. We have considered whether we should modify what would otherwise be the rule in this case, and have come to the conclusion that no such change should be made, and that the plaintiff should pay the costs of the trial below, and of these motions, which necessarily resulted from his own faithless act.

The judgment of the court is, that the judgment of the court below be stricken out, and the case be remanded for a new trial.

WILLIAM NOTTINGHAM v. THE BALTIMORE AND POTOMAC RAILROAD COMPANY.

AT LAW.—No. 15,016.

- I. Certain acts of Congress authorized the Baltimore and Potomac Railroad Company to extend its line of railroad into the District of Columbia, and along K street in the city of Washington, upon the established grade of said street. The plaintiff was a lot-owner on K street, and sued the company for damage caused to his property by the neglect of the company to provide proper means to carry off the water, which formed into pools and deep holes in front of and near said property in consequence of the embankment of the road. That said embankment also rendered the plaintiff's lots inaccessible and useless as places of business or residence: *Held*, That as the road was built in conformity to a grade which had been prescribed by acts of Congress, it was therefore a lawful road, and the damages resulting therefrom must be borne by the lot-owners.
- II. Had such road been constructed without law, or had it not been constructed in the manner prescribed by law, and special injury had been sustained by the plaintiff, this would have been a good ground for damages.
- III. Where an injury is the result of a common nuisance, it is not a ground of action for damages unless the plaintiff can prove some injury to himself, of a character different in kind from that common

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injury which he may have sustained with the rest of the public by reason of such nuisance. And this special injury must be something not merely differing in degree, but in kind, from that which is common to all. This doctrine applied in a case where it is alleged that railroad crossings at the junction of streets in a city were neither safe nor convenient for the passage and transportation of persons and property across and along the same.

STATEMENT OF THE CASE.

The action was brought by the plaintiff to recover damages alleged to have been caused by the defendant in constructing its railroad along K street, in the city of Washington. The plaintiff is the owner of certain lots at and about the intersection of Third and K streets and Canal and K streets, where the injury complained of took place. The pleadings in the cause, and the acts of Congress by virtue of which the company extended its road into the District of Columbia and along K street, are sufficiently set forth in the opinion of the court, and it is only necessary to add that at the close of the testimony the court instructed the jury as follows:

“1st. If the jury believe from the whole evidence that the plaintiff was the owner of the real estate in the declaration described at the time of the construction and location of the defendant's road in the declaration set forth, and was then, and ever since then, the fee-simple owner thereof, and that the said road upon said street was constructed by defendant upon the grade established by law, and in consequence of the construction of said road as aforesaid water collected near the plaintiff's said property, by which it was frequently flooded, and which caused holes, gullies, excavation, gravel, filth, dirt, and mud to be formed and to collect near to the said property of the plaintiff, rendering the same difficult of access, inconvenient, unpleasant, and uncomfortable, and subjecting the plaintiff to annoyance and expense; all of which the defendant might have prevented by the exercise of proper skill and care in providing reasonable means for carrying off the same, but failed to do so,—the jury should find for the plaintiff and allow him damages commensurate with the loss

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and injury he has sustained thereby, for one year previous to the bringing of this suit.

"2d. If the jury believe from the evidence that the defendant, at the intersection of Third and K streets, failed to provide proper crossings and passage-ways, and at the intersection of Canal and K streets failed to provide either crossings or passage-ways, and they further believe that the said Canal street, at the said intersection with K, was, anterior to the construction of defendant's said road, used as a public street, and in consequence of their said failure to provide proper crossings and passage-ways, the said property of the plaintiff was rendered inaccessible, or difficult and dangerous of access for vehicles of any kind, thereby causing to the plaintiff in the use and enjoyment of his said property special and peculiar damages, then they shall find for the plaintiff, and assess his damages commensurate with the loss and inconvenience he has sustained thereby, for one year previous to the bringing of this suit."

Exceptions were noted to the granting of these prayers, and the chief justice presiding at the trial, in addition thereto, instructed the jury, among other things, as follows:

"You will inquire what material damage to the comfort; damage to the health, if any damage has been sustained there; damage to the convenience of access to the habitation of the plaintiff; and when you have found out what it is, as well as you can, in light of the proof before you, and when you have found out that the defendant is the cause of it, report it here in favor of the plaintiff in that amount. If, on the other hand, you should find that the defendant entered into the occupation of that street for railroad purposes under the license of the law, and in laying the foundations for its track increased the altitude of the street in its grade, and provided adequate and ample means for the escape of the water, you will find a verdict for the defendant.

"Again, if you find from the testimony that the defendant did not provide a reasonable, secure, and comfortable crossing, or, in the language of the law, proper crossing at

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the intersection of the streets across which they travelled with their railroad, and, in addition, find that the neglect to make that crossing had an individual effect to prevent the plaintiff's access to his property, as distinguished from the embarrassment to the community at large—for that is what this distinction we have been talking about means—you will add that to the account of damages that relate to the crossing of K street."

To which instructions the defendant, by its counsel, then and there, and before the jury retired, duly excepted; which exception was noted upon the minutes of the court.

The verdict of the jury was for the plaintiff for the sum of five hundred dollars.

The defendant now moves for a new trial on the foregoing exceptions, which have been duly signed and sealed.

James McD. Carrington and E. C. Carrington, for plaintiff.

In support of the two propositions—first, that a railroad company is responsible to a citizen for injury to his property resulting from the negligent and unskillful construction or management and conduct of its road; second, that a railroad company creating a nuisance, not the natural and necessary consequence of its business, but resulting from negligence, either in the construction or management of its road, or in the commission of some act prohibited by law, or in the omission of some act required by law, is responsible in damages to the citizen who suffers thereby special and peculiar damages, that is to say, damages different from the community generally, or greater than any one else in the community—the plaintiff, by his counsel, refers to the following authorities: *Tute v. Ohio and Mississippi Railroad*, Porter, 7 Ind., 479, 38; *Lackland v. North Missouri Railroad*, 31 Mo., 180; *Fletcher v. Auburn and Syracuse Railroad*, 25 N. Y., 462; *Gray v. St. Paul and Pacific Railroad*, 13 Minn., 315; *Parrot v. Cincinnati, Hamilton and Dayton Railroad*, 10 Ohio, 624; *Protzman v. Indianapolis Railroad*, 9 Ind., 467; *Gorman v. Pacific Railroad*, 26 Mo., 441; *Judson v. New York and New*

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Jersey Railroad, 29 Conn., 434; *Brook v. Connecticut Railroad*, 35 Vt., 373; *Livingston v. Mayor of New York*, 2 Best and Smith, 616; 8 Wendell, 85; *Montford v. Donald*, 9 Ohio, 165; *Laws of Maryland*, 1863; *Hilliard on Law of Torts*, vols. 1 and 2.

Enoch Totten, for defendant.

In order to sustain an action of the kind set out in the declaration in this case, the plaintiff must allege and prove injury special and peculiar to himself, and of a kind different from the injuries sustained by the community or individuals generally situated like himself, in reference to the alleged nuisance. To be recoverable, the damages must be peculiar and special as distinguished from the injury and damage to the general public. It is immaterial that he may have suffered in a greater degree or more frequently than his neighbors. The damage must not only be special, but it must be shown by specially alleged facts as distinguished from general damages which necessarily follow the acts in the declaration complained of. The damages must be definable, and defined, specified, and described in the declaration, and established by the proofs.

This proposition was argued at great length and the following authorities cited: *Wood's Law of Nuisance*, secs. 621, 632, 858; *Vanderslice v. Newton*, 4 N. Y., 130; 18 Minn., 92; *Thayer v. Brown*, 19 Minn., 514; *Quincy Canal v. Newcomb*, 7 Metc., 283; *O'Brien v. St. Paul*, 18 Minn., 180; *Barnard v. Conn. R. R.*, 7 Cush., 510, 255; *Iron Co. v. R. R.*, 5 Allen, 224; 53 N. Y., 152; 13 Allen, 94; *Paine v. Dart*, 7 Cow., 609; *Parker v. City*, 11 Grey, 354; *Farling v. Peters*, 3 Me., 491.

Mr. Justice WYLIE delivered the opinion of the court:

The company, defendant in this case, was incorporated by act of the State of Maryland passed the 6th of May, 1853, but no act of Congress was obtained allowing the extension of the road into the District of Columbia until the passage of

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the act approved February 5, 1867. (14 Stats. at L., 187.) By the third section of the act it was provided: "That whenever the said company, in the construction of a railroad into or within the said District, as authorized by this act, shall find it necessary to cross or intersect any established road, street, or other way, it shall be the duty of said company so to construct the said railroad across such established road, street, or other way as not to impede the passage or transportation of persons or property along the same; and when it shall be necessary to pass the said railroad through the land of any individual within the said District, it shall also be the duty of said company to provide for such individual proper wagon-ways across the said railroad from one part of his land to another; but nothing herein contained shall be so construed as to authorize entry by said company upon any lot or square, or upon any part of any lot or square, owned by the United States within the limits of the city of Washington, for the purpose of locating or constructing the said road, or of excavating the same, or for the purpose of taking therefrom any materials, or for any other purpose or uses whatsoever; but the said company, in passing into the District aforesaid and constructing the said road within the same, shall enter the city of Washington at such place, and shall pass along such public street or alley to such point or terminus within the said city, as may be allowed by Congress upon presentation of survey and map of proposed location of said road: *Provided*, That the level of said road within said city shall conform to the present gradation of the streets, unless Congress shall authorize a different level."

By an act of Congress approved March 18, 1869, two routes were designated, by either of which the company was authorized to enter and construct its road within the city of Washington.

By another act approved March 25, 1870, (16 Stats. at Large, 78,) this option was extended to a third route, and by this route the road was subsequently constructed, passing along K street and in front of the property of the plaintiff,

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lying between Third street east and Canal street, in squares 767 and 768. This third route differed but little from one of those which had been designated by the act of March 18, 1869, and which was generally known as the Virginia avenue and K street route.

After this came the ordinance of the late corporation of Washington, passed May 31, 1870, designating the K street route for the road, with some further but not inconsistent provisions, according to a certain plan and profile of the road which had been prepared by the company.

This ordinance contains the further provision that the company shall "be permitted to change the grade of certain streets at certain points, as designated on said profile and plan, so that the grades shall conform to the blue figures on said plan, and shall be so laid down upon the books in the city surveyor's office as the established grades."

A proviso required that "whenever sewers, gutters, curbstones, or sidewalks, or flag footways, gas or water pipes, are disturbed or moved by the said company, the same shall be rebuilt in a proper and satisfactory manner at the expense of the said company, and without cost or loss to any citizen or to the corporation of Washington."

And this ordinance seems to have been ratified by act of Congress approved May 21, 1872, entitled "An act to confirm the action of the board of aldermen and common council of the city of Washington designating a depot site for the Baltimore and Potomac Railroad Company, and for other purposes."

Under authority thus conferred, the company built its road in front of plaintiff's lots, at an elevation of two feet above the original grade, such elevation being in conformity to the new grade.

The first count in the declaration avers that damages had been sustained by the plaintiff from two causes: first, that access to the front of his property had been rendered difficult by the elevation of the road in front of the property; and second, that, in consequence of the construction of the

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road at said elevation, the water which otherwise would have remained upon the street, or flowed off in a different direction, had been turned aside, overflowing his lots and filling the basements of his houses. It is not averred in the declaration, nor was there any evidence to show the existence of any spring of water or water-course upon or near the property in question. The overflow complained of was occasional, and the result of rains when these were heavy.

It is manifest that both these grounds of complaint were results caused by the construction of the road in the manner authorized by law. The fee-simple of the street belonged to the United States, and the road was built according to a grade which had been prescribed both by the city authorities and by Congress. It was a lawful road, therefore, and the consequences complained of would have been the same had a road of any other description been so constructed.

In all such cases the damages must be borne by the lot-owners. They buy their property with a knowledge of that risk. If they would avoid damage from the overflow of water, they must fill up their lots; and, generally, they are not losers by the change, as the property is enhanced in value. Even special injury in such a case is no ground for damages; as, if a plaintiff were to bring his action for having fallen down and broken a limb in crossing the tracks, this would not entitle him to recover, for the reason that the road was there by authority of law. In *The Eleanor*, 2 Wheat., 358, it is said by the Supreme Court that "whatever may be the injury that casually results to an individual from the act of another while pursuing the reasonable exercise of an established right, it is his misfortune. The law pronounces it *damnum absque injuria*, and the individual from whose act it proceeds is liable neither at law nor in the forum of conscience." "In cases of this nature a loss or damage is, indeed, sustained by the plaintiff, but it results from an act done by another free and responsible being which is neither unjust nor illegal." (Broom's Legal Maxims, 151.)

Had the road in question been constructed without au-

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thority of law, or had it not been constructed in the manner prescribed by law, and special injury had thereby been done to the plaintiff or his property, this would have been good ground for damages; but in the present instance no such violation of duty on the part of the defendant has been alleged in the declaration or appears in the evidence.

The obligations which the defendant was under in this respect are found in the proviso to the city ordinance, in these words: "Whenever sewers, gutters, curbstones, or sidewalks, or flag footways, gas or water pipes, are disturbed or moved by the said company, the same shall be rebuilt in a proper and satisfactory manner at the expense of the said railroad company, and without cost or loss to any citizen or to the corporation of Washington."

The declaration in the present case, however, contains no averment that defendant had been derelict in duty in any of these respects, nor does the evidence in the record show such neglect.

Under this first count, plaintiff's cause of action has no other foundation than certain injuries to his property alleged to have resulted from the lawful construction of the road by the defendant.

We now proceed to consider plaintiff's case as set out in the second count of his declaration.

By the third section of the act of February 5, 1867, it was declared "that whenever the said company, in the construction of a railroad into or within the said District, as authorized by this act, shall find it necessary to cross or intersect any established road, street, or other way, it shall be the duty of said company so to construct the said railroad across such established road, street, or other way as not to impede the passage or transportation of persons or property along the same."

The second count charges that defendant had not observed this injunction of the law by its failure to construct proper crossings at the intersections of its road with Third and Canal streets respectively, in consequence whereof the plaintiff "has

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suffered damages and been greatly injured in his said estate, the same being greatly diminished in value thereby, and has been injured in the use and enjoyment of his said property, as hereinbefore alleged and set forth; and that he and his said property have been greatly damaged thereby, to wit, in the sum of five thousand dollars."

Here is a violation of law plainly alleged. The injury, however, was one which affected the whole public as well as the plaintiff, the latter no otherwise nor in any greater degree than others, except that his inconvenience was necessarily greater than theirs, in consequence of the location of his property at the junction of the streets.

The failure of defendant to construct proper crossings at those points is alleged to have been an injury to the whole public, as the count avers that "this portion of their said road is neither safe nor convenient for the passage and transportation of persons and property across and along the same."

Had the plaintiff alleged any particular and special injury, either to himself or his property, in consequence of the nuisance, and proved his case, he would have been entitled to damages; but on that point the only allegation is that his property at that place had been greatly diminished in value, and that he had been injured in its use and enjoyment "as hereinbefore set forth." Now, the damage "hereinbefore set forth" must refer to the first count of the declaration, and there, as has been shown, the damage alleged was such only as was the inevitable result from the lawful construction of the road. Certainly here is no such special case alleged as can enable the plaintiff to maintain an action for damages resulting from the existence of a public nuisance. The plaintiff's inconvenience from this nuisance may have been greater than that of the public generally, but even that is not alleged in this count. On this subject the authorities are very numerous. We adopt the rule as laid down by Chief Justice Shaw in *Thayer v. Boston*, 19 Pick., 514, as follows: "It is a well-settled rule of law, that if an individual suffer special damage by any unlawful act in obstructing

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a highway, he shall have his action, although the party doing the act is liable to an indictment. But without such special damage, although the act is unlawful, and although more injurious to one proprietor, on account of his proximity to the highway, than another, still he cannot have an action, because actions would thereby be multiplied indefinitely; but the offender shall be prosecuted by indictment, by which the offense shall be punished and the wrong redressed once for all. What is special damage to sustain the *per quod* and enable one to have his several actions for an injury common to the whole community, is often a difficult question. It seems to be settled by authorities that it must be something not merely differing in degree, but in kind, from that which must be deemed common to all." (See *Stetson v. Faxon*, Id., 147; *Proprietors of Quincy Canal Co. v. Newcomb*, 7 Metc., 283; *Barnard v. Connecticut River Railroad Co.*, 7 Cush., 510; *Smith v. Boston*, 7 Cush., 225; *Full River Iron Co. v. Old Colony Railroad Co.*, 5 Allen, 224; *Paine v. Dart*, 7 Cow., 609; *Wood on Nuisances*, secs. 621, 858, 873, 829.)

Since this case was argued, the case of *Lynch v. The Mayor of New York* has been brought to our attention, as published in "The Albany Law Journal" of March 1, 1879. The opinion of the Court of Appeals of New York in this case was delivered by Mr. Justice Earl, and the doctrine held is well stated in the syllabus, as follows: "The complaint in an action against a city alleged that the plaintiff was the owner of a lot in a city near a certain avenue; that the defendant caused the grade of such avenue to be raised, but failed to provide any means for carrying off the rain-water, by reason whereof such rain-water flowed from the said avenue upon the plaintiff's lot to his damage: *held*, not to state a cause of action. A city has at least the same right to improve its property as a private owner; and so long as the surface water is not collected into a channel, and thrown upon another's land, the city is not liable." *Vanderwiele v. Tynlor*, 65 N. Y., 341, and *Gannon v. Hargadon*, 10 Allen, 106, are cited in the opinion for this doctrine.

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We think, therefore, that both the prayers on behalf of the plaintiff ought to have been refused, and that the charge of the court as excepted to was also erroneous.

It is hardly necessary to examine the instructions asked for by the defendant, as, for the most part, they were the converse of the propositions contained in those of the plaintiff, and ought, therefore, we think, to have been granted. One or two of them, perhaps, were objectionable in some respects, but not so in respect of the substantial matters in controversy.

Being of opinion, therefore—

1st. That no one is liable to another in damages for doing with his own whatever he is permitted to do by law; nor is liable in damages for not doing in behalf of another that which he is under no obligation to do; and that if loss happen to another in either of these contingencies, such loss must rest where it has fallen—that it is a case of *damnum absque injuria*.

2d. That where the injury is the result of a common nuisance, it is not a ground of action for damages unless the plaintiff can prove some injury to himself of a character different in kind from that common injury which he may have sustained with the rest of the public by reason of such nuisance.

3d. Being of opinion, also, that the case made by the present plaintiff, both in his declaration and his proofs, is faulty in each of these respects, we think the judgment should be reversed and a new trial awarded. It may not be impossible to cure or supply these defects, and for that reason this opportunity is given.

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THE FREEDMAN'S SAVINGS AND TRUST COMPANY v.
ROBERT P. DODGE, PHILIP A. DARNEILLE, FRED-
ERICK W. JONES, WILLIAM L. DUNLOP, AND EMI-
LIE M. DARNEILLE.

EQUITY.—No. 3217.

A decree was passed for the sale of real estate described in a deed of trust, and that complainant should recover of the defendant any deficiency over and above the proceeds of sale. The decree was upon appeal affirmed by the Supreme Court of the United States, and the case remanded to this court; and the proceeds of sale being insufficient to pay the debt, a personal judgment against the defendant was allowed, in conformity with the original decree.

STATEMENT OF THE CASE.

The Freedman's Savings and Trust Company filed the original bill, praying to set aside a release of a trust deed on the ground of fraud in its execution. On the 19th day of January, 1869, the defendant Dodge made three promissory notes in the sum of \$13,000, payable to the order of one Benjamin Darby, and at the same time, with his wife, executed and delivered to the defendants Jones and Darneille the deed of trust in question, on certain real estate in the city of Georgetown, to secure the payment of said notes. The latter were endorsed by said Darby, and were for a valuable consideration sold and delivered to the complainant, and have ever since belonged to it. The bill then alleges that on or about the 22d day of July, 1871, the said Jones and Darneille, without the knowledge, authority, or consent, and in fraud of the rights of the complainant, and while the complainant was the holder and owner of the notes, executed and delivered to said Dodge a release bearing date December 31, 1870, of the said deed of trust, and thereby undertook to discharge the real estate embraced therein from the operation of said trust, and that said Dodge, Jones, and Darneille knew that the notes were then due and unpaid, and that they were the property of and held by the complainant. The bill concludes with

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a prayer that the release be decreed to be null and void, and of no effect as against the complainant, and that the real estate be sold under the decree of this court, and that out of the proceeds the amount due the complainant on said notes be paid; and that complainant may have a judgment against said Dodge, and execution thereof as at law. The cause was heard at the special term upon pleadings and proofs, and the bill dismissed. The general term reversed this determination, and passed a decree annulling the release, and setting aside two other conveyances of the property that had been made by the parties, and directed the sale of the property in parcels, and that the proceeds arising from such sale should be applied to the extinguishment of the amount due upon the said promissory notes. The decree then provides that "the plaintiff have and recover of the defendant Robert P. Dodge whatever amount may remain due upon the three promissory notes mentioned and described in the bill of complainant, and made by the said Robert P. Dodge after the application thereto of the proceeds of said sales, together with the costs of this suit, and that the said plaintiff have execution therefor as at law."

From this decree an appeal was taken to the Supreme Court of the United States, and it was there affirmed. (2 Otto, 370.) Upon the remittitur of the case to this court, an application was made on the decree of the general term, and on the decree of the Supreme Court of the United States affirming same, for the appointment of a trustee to sell the property; and on the 14th day of March, 1877, an order was passed appointing a trustee, and directing the manner of his proceedings in conducting such sale. The report of the trustee being made, a reference to the auditor took place to state his account and to make the proper distribution of the fund. The report of the auditor shows that the proceeds of the sale are insufficient to pay the debt and interest thereon, and that such deficiency amounts to over the sum of \$7,000. A motion was then made in the special term for a personal judgment against the defendant Dodge for the amount of the

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deficiency, as provided for in the decree of the general term, and that motion has been certified here to be heard in the first instance.

Enoch Totten, for complainant.

Courts of equity have always rendered judgments for the payment of money, and their rules provide for the enforcement of such judgments.

In the courts of equity in England, a decree for the payment of a specific sum of money has the effect of a judgment at law, and may be enforced by a writ of *fieri facias*. (Adams Eq., 395; 2 Dan. Ch. Pr., 1020.) By the eighth rule in equity prescribed by the Supreme Court of the United States, it is provided that in cases where the decree is solely for the payment of money, the final process for its execution shall be a writ of execution in the form used in suits at common law in actions of *assumpsit*.

Our own rule on this subject is as follows: "Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of *fieri facias*, or by sequestration attachment against real estate, goods, chattels, or credits of the defendant." (Eq. Rule 84.)

It seems to be clear that, according to the equity practice which has prevailed from time immemorial, and which now prevails, this court has not only the power, but it is its plain duty, to render a personal judgment for the balance due on the notes. The whole case is before the court, and the facts are undisputed. The balance due has been ascertained. In addition to the force of precedents and immemorial usage, we have a statute prescribing the method of proceeding in cases of this kind. The tenth section of the act of February 22, 1867, provides that "the proceeding to enforce any lien shall be by bill or petition in equity, and the decree, besides subjecting the thing upon which the lien has attached to the satisfaction of the plaintiff's demand against the defendant, shall adjudge that the plaintiff recover his demand against the defendant, and that he may have execution thereof as at

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law." (14 Stats., 404; Rev. Stats. D. C., sec. 808.) The decree in this case was framed upon this statute.

W. S. Cox, for defendant Dodge.

The decree *in personam* was interlocutory. It simply declared that in a contingency which might never have occurred, to wit, the failure of the proceeds of sale to satisfy the debt, the plaintiff should recover of the defendant a sum yet to be ascertained. It is evident that no execution could issue on such a decree, and that a further decree is necessary therefor. The distinction between final and interlocutory decrees is clearly drawn by the Supreme Court of the United States. A decree is final which leaves nothing to be litigated between the parties and awards execution. (*Witenburg v. United States*, 5 Wall., 819; *Bernard v. Gibson*, 7 How., 650; *Chace v. Vasquez*, 11 Wheat., 429; *Young v. Smith*, 15 Pet., 287; *Perkins v. Fourinquet*, 6 How., 206; *Craighead v. Wilson*, 18 How., 199; *Beebe v. Russell*, 19 How., 288; *Farely v. Woodfolk, Id.*, 288.)

The decree *in personam* is erroneous, and was inadvertently passed without argument or special consideration. This bill was filed, primarily, to set aside a release of a deed of trust and to reinstate the trust. Incidentally, the bill went further, and prayed that the property might be sold under decree of the court. The highest effect that can be given to the case in favor of the complainant is to treat it as a foreclosure suit. But in such a suit a court of equity cannot give a personal decree against the mortgagor, according to the general principles and practice of equity. (*Noonan v. Lee*, 2 Black, 500; *Orchard v. Hughes*, 1 Wall., 77.) It may be supposed to be authorized by act of Congress of February 22, 1867, chapter 64, volume 10; but this is clearly an error.

The decree *in personam* being erroneous, and being merely interlocutory, the court ought not to enforce it by a final decree, if it can be avoided, and it can be by either rescinding or disregarding it. Thus it was held, in *Fourinquet v. Perkins*, 16 How., 82, that where a case is before the court on final hearing, the judge may reverse his former decision in

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the cause and dismiss the bill if justice requires it; *all previous interlocutory orders are open for revision*. In that case, after an interlocutory decree had been passed, a decision by the Supreme Court in another case showed it to be erroneous; wherefore it was reversed by the same court which rendered it.

Mr. Justice MACARTHUR delivered the opinion of the court. After stating the case, he continued as follows:

The first objection made to this motion is, that the portion of the original decree directing that the complainant have and recover of the defendant Dodge any balance remaining unsatisfied over and above the sales of the property, is a decree *in personam* and interlocutory. We think, however, that, after the affirmance of that decree by the Supreme Court upon his own general appeal, he is estopped from raising this point now. It is a matter of settled practice that all interlocutory orders or decrees are subject to review and revision by an appellate tribunal upon an appeal from a final decree in the same cause, and that whatever might have been properly decided is to be considered as settled and finally determined. The appeal was general; the affirmance being equally general, how can we limit its effect? Moreover, it was the defendant's own appeal. A decree of foreclosure was before the Supreme Court in *Noonan v. Lee*, 2 Black, 499, which contained a clause that the mortgagor should pay the balance which might remain unsatisfied after exhausting the proceeds of the mortgaged premises, and the court considered it and reversed that part of the decree, and the competency of the court to do this was not questioned. A decree of foreclosure and sale of mortgaged premises is such a final decree as may be appealed to the Supreme Court. (*Ray v. Low*, 3 Cranch, 179.) And the present case is quite analogous, and undoubtedly the defendant would have been entitled to the full benefit of the objection he now makes, if it were a valid one, had it been called to the consideration of the appellate tribunal. In the case of *Noonan v. Lee* the court announced

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that, in the absence of a rule authorizing a decree for a deficiency, it was not competent for the Circuit Courts to make an order of that description, and that they could not assimilate their practice in this particular to that of the State courts. In 1864 the Supreme Court, for the purpose of setting this difficulty aside, adopted a general rule of practice in the Circuit Courts of the United States for the foreclosure of mortgages, which prescribes that a decree may be rendered for any balance that may be found due over and above the proceeds of sales. (1 Wall., 5.) In addition to our general jurisdiction, we possess that of Circuit Courts, and our practice is regulated by the rules prescribed for those courts where we have none of our own. The bill in this case prays that the property be sold and for a judgment against Dodge. Now, if the decree in this case is analogous to that in a foreclosure suit, (and this seems to be admitted,) there can be no objection under this rule to that part of it now under consideration. Besides, our own equity rule 84 provides that "final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of *fiery facias*," &c.; and section 808 of the Revised Statutes of the District of Columbia gives a similar power in all proceedings to enforce liens by bill in equity. The tedious process of English chancery for enforcing decrees have been done away not only here, but the same object has been obtained by the 1 and 20 Victoria, chapter 110, section 18, which directs that all decrees and orders of courts of equity, by which any sum of money or costs shall be payable to any person, shall have the effect of judgments at law, and the general orders of the court provide for the same process of executions as at law. (Adams Eq., 395.) We have, by this practice, a simple method of giving effect to a decree for the payment of money. When the decree provides that the defendant shall pay, it is then only necessary to ascertain the amount. This has been done, and it only remains to perfect the decree as to the sum of the deficiency, and then to issue the execution against the property of the defendant as on a judgment at law.

In the matter of the estate of Ferdinand Butler.

As these observations dispose of the case, we will pursue the subject no further. The motion is allowed, and the solicitor for complainant may prepare the necessary order.

IN THE MATTER OF THE ESTATE OF FERDINAND
BUTLER, DECEASED.

Under the Maryland act of 1798, chapter 61, section 15, not more than \$300 can be allowed for funeral expenses, although the decedent left a large estate, and directed his executors to bury him decently at their discretion.

STATEMENT OF THE CASE AND DECISION.

This is an appeal from an order of the special term, sitting in probate, reducing funeral expenses in the above case to \$300.

It appears from an agreed statement of facts that the decedent left personal and real estate in the city of Washington amounting to between \$35,000 and \$45,000, and a will, in which he designated Andrew J. Joyce and Thomas J. Meyers as his executors. Mrs. Elizabeth C. Earhart is one of the heirs and next of kin to the deceased, and is also a devisee under the will. The personal estate is not sufficient to pay the debts against the estate in full. The costs and expenses of the funeral, as paid by the executors, amounted to the sum of \$417; and the said executors filed their accounts in court, and claimed allowance and credit for said funeral expenses.

Mrs. Earhart objected to the allowance of all of said sum of \$417 as funeral expenses.

Thereupon the court ordered and decreed that said funeral expenses be reduced to \$300, and that said executors be allowed credit for that sum; and further ordered that the sum of \$117, part of said funeral expenses, be not allowed against the estate.

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The executors appealed in open court from said orders and decrees, and said appeals are duly noted on records of said court.

The act of Maryland of 1778, chapter 100, section 15, concerning executors and administrators' accounts, reads as follows: "On the other side shall be stated the disbursements by him made, viz.: 1st. Funeral expenses to be allowed at the discretion of the court, according to the condition and circumstances of the deceased, not exceeding three hundred dollars."

The executors are by the will directed in their discretion to decently bury the body of the testator.

At the close of the argument the court affirmed the decrees, saying that the language of the act was plain and decisive, that the funeral charges should not exceed the sum of \$300; and that the expression of the will, that the testator should be decently buried at the discretion of his executors, did not release them from putting the estate to any greater expense.

William J. Miller, for the executors.

Durant & Hornor, for Mrs. Earhart.

JOHN W. RITCH, SUING TO THE USE OF DAVID DINK-
ELSPAIL, v. CAROLINE A. HYATT.

AT LAW.—No. 18,726.

- I. A married woman cannot be sued when she is a resident in the District of Columbia, under the act of 1869, unless she has a separate estate in said District, in relation to which the contract in suit was made. So held in a case where she gave a joint and several bond for real estate purchased in the city of New York.
- II. The common-law disability of a married woman to contract has not been removed by that statute, except when her contract has relation to her previously acquired separate estate. This doctrine does not operate to prevent her right to change the investment of her means, by selling property and purchasing other property with the proceeds, that being a right she has always possessed.

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STATEMENT OF THE CASE.

The declaration sets forth that the defendant, jointly and severally with two others, executed a bond dated May 27, 1872, to the plaintiff, as guardian, in the sum of \$12,000, subject to the condition for the payment of the sum of \$5,725, with interest, on the 1st of December, and that there is due and unpaid a large amount thereon. The following is the concluding averment:

"The defendant was, at the time of making her said bond, a married woman. Before making the said bond the defendant was tenant in common in fee with her co-obligors and the plaintiff's wards of certain land situate in the city of New York, and held by her as her sole and personal property; thereupon a suit was begun in the courts of New York for partition of the said land, to which suit all the owners thereof were parties; the said courts thereupon decreed that partition of the said lands could not be made without great prejudice to the owners thereof, and was difficult, if not impracticable, and that the said land should be sold; thereupon the defendant and her co-obligors, in order to effect partition of the said land, and the defendant also with the purpose of benefiting her sole and separate estate, agreed with the plaintiff to purchase his wards' share thereof; thereupon, and in pursuance of this arrangement, the said land was conveyed in fee under the order of the court to one Westervelt, who acted for the defendant and her co-obligors, and had no beneficial interest in the said land, who immediately conveyed it in fee to the defendant and her co-obligors, all being adults, as tenants in common. The defendant thereupon, with her co-obligors, made the said bond to secure to the plaintiff the purchase-money of his wards' share of the said land, and upon such conveyance one-third of the whole land was vested in the defendant as her sole and separate property."

The defendant demurred on the ground that the contract was executory, and not made in relation to or for the benefit

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of her separate estate, and that the bond was given as security.

Case certified to be heard at general term.

William Lowndes, for plaintiff, cited *Nash v. Mitchell*, 3 Abb. New Cases; *Wood v. Sanchey*, 3 Daly, 197; 5 Id., 207, 28; *Hinkle v. Smith*, 51 N. Y., 21.

A. C. Bradley, for defendant, cited Wells Sep. Estate Married Women, secs. 198, 199, 329, 357; Bishop Law of Married Women, secs. 80, 88; *Patterson v. Robinson*, 25 Penn. St., 82; *Ramberger's Adm'r v. Ingraham*, 38 Penn. St., 146; *Keiper v. Helpricker*, 42 Id., 325; *Dunning v. Pike*, 46 Me., 463; *Brown v. Hermann*, 14 Abb. Pr. R., 394; *Frecking v. Rolland*, 53 N. Y., 425; *Carpenter v. Mitchell*, 50 Ill., 472; *Ames v. Foster*, 42 N. H., 381; *Jones v. Crossthwaite*, 17 Iowa, 402; *Whitworth v. Carter*, 43 Miss., 72; *Atkinson v. Richardson*, 74 N. C., 458; *Pemberton v. Johnson*, 46 Mo., 342.

Mr. Justice WYLIE delivered the opinion of the court :

The defendant, a married woman, was owner of an undivided interest in certain real estate in the city of New York. She united with three of the other owners in purchasing the remaining fourth interest, and in giving their joint and several bond for the purchase-money, five thousand dollars.

The purchase-money was not paid, and an action upon the bond has been brought against her alone in this District.

Her counsel have filed a general demurrer to the declaration, so that we have no information as to any facts, except such as appear upon its face. The declaration avers that she was a married woman at the time of entering into the contract; but it contains no averment of the place where the bond was executed, or of the statute which might have authorized her to make the bond. It may be presumed, however, that she is a resident of this District, because she has been sued here, and there is no contrary averment but that the bond was executed in New York, because it relates to a transaction in that city. But of the statutes of New York

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bearing upon the questions involved in the controversy we have no judicial knowledge, nor does the declaration contain any averment as to their character.

The declaration is in the common form of debt upon bond, where the action is for the recovery of a personal judgment against the defendant, except only the statement that she is a married woman. We are of opinion, however, that the questions arising on this demurrer must be determined according to the laws of this District; so that the omission of the pleader to aver and set out the statute of New York in his declaration, does no injury in his case. If Mrs. Hyatt, being a married woman, resident in this jurisdiction, had no power, according to our laws, to bind herself by the contract in question, such contract cannot be enforced against her in this court, nor do we see how it could bind her even in the courts of New York. The rule on this subject is thus laid down in Story's Conflict of Laws, sec. 65: "That the personal capacity or incapacity attached to a party by the law of the place of his domicile, is deemed to exist in every other country, (*qualitas personam, sient umbra, sequitur,*) so long as his domicile remains unchanged, even in relation to transactions in any foreign country, where they might otherwise be obligatory. Thus a minor, a married woman, a prodigal or a spendthrift, a person *non compos mentis*, or any other person who is deemed incapable of transacting business *sui juris* in the place of his or her domicile, will be deemed incapable everywhere, not only as to transactions in the place of his or her domicile, but as to transactions in every other place."

And in section 66a the same author says: "If, by the law of the place of domicile of the husband, a married woman has a capacity to sue or to make a contract, or to ratify an act, her acts so done will be held valid everywhere. On the contrary, if she is deprived of such capacity by the law of the domicile of her husband, that incapacity exists in relation to all the like acts and contracts, even when done in a foreign country, or with reference to property in a foreign country."

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In subsequent sections this doctrine is discussed at great length, and shown to rest upon the soundest principles of reason and public policy, and to be the doctrine not only of the common law, but that also of France and other countries whose systems have been constructed upon the foundations of the civil law. The domicile of the defendant's husband is her domicile, and the District of Columbia being that domicile, the extent of her capacity to make contracts is to be determined, therefore, by the laws of the District, and not by the laws of New York, although the contract in question relates to property situate in that State.

The common-law disability of a married woman to dispose of her property was, to a great extent, removed by the act of Congress of the 10th of April, 1869, which we now quote at length, from the Revised Statutes relating to the District of Columbia :

"SECTION 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts.

"SECTION 728. Any married woman may convey, devise, and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried.

"SECTION 729. Any married woman may contract and sue, and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried.

"SECTION 730. Neither the husband nor his property shall be bound by any such contract made by a married woman, nor liable for any recovery against her in any such suit; but judgment may be enforced by execution against her sole and separate estate, in the same manner as if she were unmarried."

As has been said already, the bond upon which the present action was brought was given by the defendant for the pur-

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chase of real estate in the city of New York. We are informed extrajudicially that by the laws of New York a married woman is allowed to become a sole trader, and is, of course, authorized to make purchases and enter into any contracts necessary or proper to carry on her business. She is, also, expressly authorized to "*purchase*" property as a *feme-sole* without restriction. It is believed that similar laws have been enacted in other States. Our statute has conferred neither of these powers on the married woman.

If she possess power to purchase property during coverture, it must be a power implied from these words in section 727: "or acquired during marriage in any other way than by gift or conveyance from her husband."

We think that no such power can be derived from language so general and vague, except by a forced construction of the statute. The statute was evidently framed in this respect, with reference to an existing capacity on the part of married women, according to the common law, to acquire property by descent, by gift, or by devise. No one would contend that these words confer the power on married women in this District to buy and sell as *feme-sole* traders; and yet this construction would not be more unreasonable than to say that they confer the power to trade in buying and selling real estate.

The statute makes no distinction between real estate and personal property; and if it authorize the married woman to purchase real estate, it confers on her equal authority to buy personal property, and being in possession of this power, she might become a trader in both, and be bound by her contracts, without regard to the question whether she had any property in her own right.

In *Green v. Wood*, 72 B. Rep., 178, (cited in Dwarrris on Statutes, 584,) Lord Denman, Ch. J., said: "It is extremely probable that the alteration suggested would express what the Legislature meant; but we, looking at the words as judges, are no more justified to introduce that meaning than we

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should be if we added any other provisions. We can do no more than give such meaning as the words authorize."

In the present case, we think the words of the statute have given no new rights to the married woman in respect to the means of acquiring property. It makes a very complete settlement of all that she had, and all that she may acquire, to her own sole and separate use, without conferring any new right of acquiring property in her own right. A married woman could always acquire property by gift, either by means of deed or will from others, and that faculty is preserved and made effectual by the statute. The statute may receive a perfectly free and liberal construction, and yet this principle of the common law, which indeed is for her own security and protection, remain as it has been.

This doctrine, however, can have no effect to prevent or interfere with her right to change the investment of her means by selling property and purchasing other property with the proceeds. That is a right which she has always possessed.

Other questions of an interesting character are naturally suggested by the present controversy; but they are not necessarily involved in its determination, and need not, therefore, be considered.

It follows, from the views that have been expressed, that the demurrer should be allowed, and judgment entered for the defendant, with costs.

Mr. Justice Cox delivered the following concurring opinion:

The substance of this case is, that a married woman owning, as her separate estate, an undivided fourth part of certain real estate in New York, contracted to buy another undivided fourth from the owners of it, and gave the note on which this suit is brought for the agreed price; and the question is, whether the act of April 10, 1869, empowers her to make such a contract.

That act declares that "any married woman may *contract*, and sue and be sued in her own name, in all matters having

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relation to her sole and separate property, in the same manner as if she were unmarried."

The only sole and separate property owned by the defendant was the fourth which she owned before this contract was made. But the contract was not made in relation to that. It was attempted, it is true, to make it appear such by averring that it was made for the benefit of that property. But that amounts to nothing more than this, viz., that the object in view in making the contract was indirectly to benefit the property already owned; as if I should buy a house or farm adjoining one already owned for the purpose of adding to its advantages. After all, the *contract* was not in relation to that, but to other property which, when it was made, was not that of the defendant.

It would seem a very plain proposition, that, in logical sequence, a contract to buy property precedes the ownership of it, as cause precedes effect. The ownership results from the purchase, and when the contract is made it cannot be said to relate to the purchaser's property, but it relates to that of the vendor.

By no correct dialectics can the same contract which, by purchase, creates the separate property, be said to relate to the separate property of the party buying. It can only be maintained by reasoning in a circle. If we ask how, under this law, the *feme-covert* can buy the property, the only answer is, that it is a contract relating to her separate property; and if we ask how it can be that, the only answer is that she has bought the property.

Then this part at least of the law does not authorize a married woman to make an executory contract for the purchase of another's real estate. If she owns sole and separate estate, she can undoubtedly sell it, and the price would still be her separate property. She could invest her money—her separate estate—in other property. She could also exchange her separate property, and that received in exchange would be the price of what she had conveyed, and would stand in its place as to her power of disposal.

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But in each of these cases the contract would be good, not as a contract relating to the newly-acquired money or property, but as a contract relating to the estate which she owned before, the fruit of which contract would be the new acquisition.

But it is a very different thing to make a purchase of real estate and give a personal obligation for it, without reference to property already owned, and without pledging or applying it in the purchase. I do not see how a *feme-covert* could do this; and it makes no difference, in my judgment, whether she owns separate estate or not, if the contract she makes is a purely personal one and relates to property which she does not own, but is seeking to acquire by the contract. Such a contract would not be, in the language of our law, in a "matter having relation to her sole and separate property."

The idea of sole and separate ownership by a married woman, embodied in this and similar statutes, is derived from the well-known settlements of property to the separate use of married women, with or without the intervention of trustees designed to protect it from the control of husbands, and to give them a power of disposal by appointment or otherwise. Courts of equity have recognized the right of a *feme-covert*, under these settlements, to pledge such separate estate for debts, or to contract debts, as it is called, on the faith of the property. Sometimes a general obligation, merely personal in form, has been held good, only because it must be deemed to have reference to the property, as it would be otherwise unmeaning and useless. But in no case before these statutes has a court of equity considered the possession of separate property as empowering to contract purely personal obligations; and still less has it ever deemed a mere purchase of property and the giving of such an obligation to pay for it, even for the purpose of holding it as separate, to be a contract relating to separate property which a married woman was capable of making. Now, it seems to us that this statute was not designed to make any alteration in this respect. Its object apparently was to make that sole and separate property

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subject to the wife's disposal, which was not so before, and to give a *legal capacity* to contract, which was only recognized in courts of equity before. Before the statute was passed, property acquired generally by a married woman, by descent, devise, or conveyance, was not her separate property, but it only becomes so by being expressly so given.

In the absence of such express settlement, the personality becomes the husband's, and the realty was virtually his during coverture, and she had no power over either. By this law, all such property is made sole and separate, without the necessity of settlements or trustees. It is protected from the husband, and is made subject to the same control, and the wife endowed with the same powers of contracting, with reference to it, that had previously been recognized by courts of equity under the settlement I have spoken of. But it was not intended to give a new power of contracting personally.

My proposition, that the right to contract in matters having relation to her sole and separate estate does not include a power to make executory contracts for the purchase of a new estate, is sustained by several authorities.

Thus, in *Jones v. Crossthwaite*, 17 Iowa, 402, the court say:

"Only one question remains, and that is, whether, in the view that Mrs. C. was the purchaser of the real estate, the notes which she executed were in *relation to her separate property*? Her separate property, within the meaning of the law, is that which she *has* acquired by settlement upon her, by inheritance, gift, grant, or purchase, and which *is* hers."

"An *executory contract to purchase* is not a contract in *relation to her separate property*, within the meaning of section 2506 of the Revised Statutes."

So, in the case of *Ames v. Foster*, 42 N. H., 381, which was a suit on a note given for money borrowed to pay for real and personal property bought of a third person, the court say:

"By section 13 of the statute a married woman may hold any property *conveyed to her sole and separate use*, free from the control or interference of her husband as if she were sole, and * * * shall have the same rights and possess and

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be entitled to the same remedies in her own name, both at law and in equity, and be liable to be held at law or in equity upon any contract by her made, in the same manner and with the same effect as if she were unmarried." * * *

"Two views only have been presented to us; one, that which requires that a married woman must have real estate conveyed and secured to her sole and separate use before she can bind herself, upon the ground that *till then* she is not a *person holding property to her separate use*, and her contracts cannot be in respect to such separate property or pertain to it. By this construction, no contract having in view the acquisition of such property or preliminary to a purchase, would be binding. The other would make binding to a married woman all her contracts for the purchase of such property or preliminaries to such purchase, including her contracts for procuring money or other means of making such purchase."

And referring to a previous case, they say: "And the principles thus settled are approved by the court here and must govern this case. They go to the extent that the powers of the married woman to bind herself by her contract under this statute, and, as we incline to think, under the statute of 1869, exist only in cases where she is at the time of making the same entitled to hold separate property to her own use, and where the contract relates to that property. From this view it results that she can make no contract for money or property in anticipation of the purchase of such separate estate; and, consequently, the note on which this action is founded, being given for money loaned for the purpose of buying such property, was unauthorized by the act, and is not binding on the defendant."

In *Carpenter v. Mitchell*, 50 Id., 471, assumpsit against husband and wife on note given for land conveyed to the wife, a similar opinion was expressed.

It is true that in the case of *Stewart v. Jenkins*, 6 Allen, 300, this was considered too narrow an interpretation of similar language in the statute of Massachusetts; but that was doubtless because the statute *elsewhere* permits the acquisition of

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realty by a *feme-covert* by purchase, and, by allowing her also to embark in trade and business, gave her the largest possible scope, and by its manifestly liberal policy invited the most liberal interpretation.

What has been said thus far is not at variance with those cases which make the purchase-money agreed to be paid by a *feme-covert* a charge upon the property, and, to that extent, recognize her contract.

Thus, in the cases of *Patterson v. Robinson*, 25 Penn. St., 82, and *Rumberger's Adm'r v. Ingraham*, 38 Penn. St., 146, it was held that where *femes-covert* gave judgment bonds for the price of lands bought by them, they were absolutely void as personal obligations, but they were charges upon the land, because, although by the conveyances, whether the executory contracts of purchase were valid or not, the titles were vested in the purchasers, the payment of the purchase-money was a condition of the sale which a court of equity would notice and enforce.

So, in a case in New York, reported in "The Albany Law Journal," viz., *Cashman v. Henry*, decided in the Court of Appeals, the court, while holding that, under the statutes of 1848 and 1849 of New York, the contract of a married woman to buy land was not valid, say: "This view of the statute does not, however, involve the injustice of allowing a married woman to obtain the title to land upon a promise to pay the purchase-price, and then to hold it free from any claim or lien for the purchase-money. Upon the well-settled doctrines of equity, if her bond or other security for the payment of the consideration is void, the land would be subjected * * * * to a lien in favor of the vendor for the unpaid purchase-money."

I am, therefore, of opinion that the power to make an executory contract for the purchase of land cannot be derived from that part of our statute which enacts that a married woman may contract in all matters having relation to her sole and separate property. But it is claimed that this power is given by implication in another part of our laws, viz., in sec-

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tion 727 of the Revised Statutes, which declares that the right of any married woman to any property, personal or real, belonging to her at the time of marriage or acquired during marriage, *in any other way than by gift or conveyance from her husband*, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, *nor be liable for his debts*.

It is supposed that the terms "acquired in any other way than by gift or conveyance from her husband," convey an implied power to acquire in any other way than by gift or conveyance from the husband.

Is the act an *enabling* one? Does it mean to give a power to acquire which did not exist before; or does it mean merely to refer to the known methods of acquiring property by a *feme-covert*, and to give her new control over the property so acquired? It must be remembered that there were various ways in which property could be acquired by a *feme-covert*, such as descent, devise, gift and conveyance. In short, as a passive recipient she could acquire in the same way as any one else. It was merely as an active contractor that she was debarred from this privilege; so that there was an ample subject-matter for reference to in the words in question, and no necessity for supposing that they were intended to create a new method of acquiring property. If the phrase had specified the modes of acquiring, as by saying "any property acquired by descent, devise, *purchase*," &c., as was the case with the New York statute of 1860, the implication of a power to acquire in the modes mentioned would be irresistible; but it seems to me that, in its present form, the statute simply refers to any mode of acquiring sanctioned by existing laws, and means to impress the property so acquired with a new kind of ownership in the married woman. The New York statute of 1848, as amended by one of 1849, was that any married female may take by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her separate use, and convey and devise real and personal property, &c., in the same manner,

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&c., as if she were unmarried, &c., which is the same as saying, in language more resembling our law, that she could hold to her separate use property acquired by gift, grant, &c. Now, here was scope for the most liberal interpretation, and it might have been plausibly contended that by implication she was allowed to acquire in any way; that if she could acquire by grant, which did not necessarily mean a gift, she might contract for the grant. But the court, in the above case of *Cashman v. Henry*, says that these acts are not enabling acts, but the new capacity given to a married woman was to hold the estate acquired in any of the modes designated as her separate estate, without the creation of a trust or the intervention of trustees, &c.; but it is difficult to hold that the contract of a married woman to pay for a tract of land purchased by her is valid in law or equity. It was not until the term "purchase" was expressly used in the act of 1860 that such power of contracting was admitted.

The statute of New Hampshire provided that "every married woman shall hold to her own use, free from the interference or control of her husband, all property inherited by, bequeathed, *given, or conveyed to her*, provided such conveyance, gift, or bequest is not occasioned by payment or pledge of the property of the husband."

The statute of Illinois very strongly resembles ours. It provides, in substance, "that all the property which any married woman may own at the time of her marriage, or may acquire during coverture, from any person other than her husband, shall be her sole and separate property, not subject to the control of her husband, nor to the payment of his debts."

The argument from implication in favor of the wife's right to acquire property in any other way than by conveyance from her husband would apply to these statutes with as much force as to ours; and yet, as to both of these, it was held, in the cases before referred to, that no power of acquiring by purchase was conferred upon married women.

If a married woman may simply buy real estate on credit,

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she may give her obligation to pay for it. It will not do to say that it comes to her simply charged with the price, but does not create a personal obligation. That would not be a *purchase*, but simply a conditional conveyance, which might have been made before the act of 1869 was passed; but a *purchase* by her on credit is not complete without a promise to pay; and if the law authorizes the one, the other follows. Then there might be some force in the view taken in the Massachusetts case (6 Allen), that the same act which creates the separate property is a contract in relation to her separate property. At all events, such a contract would at least create the separate property, whether it be proper to treat it as a contract in relation to her separate property or not; and then, when the vendor of the land comes to sue for the price, it is a suit in a "matter having relation to her sole and separate property," whether we treat it as a suit on a contract relating to her separate property, or as simply one by which that kind of property is created.

Now, in all such matters the law says she may sue and be sued in her own name, in the same manner as if she were unmarried; and if she may be sued in the same manner, it must be further intended that the suit shall have the same effect and results; and, in fact, the law further says that judgment may be enforced by execution against her sole and separate estate, in the same manner as if she were unmarried. But an unmarried woman may be sued generally for the price of land sold her, or on her promissory note given for it, either at common law or in equity; and in such suit judgment is rendered against her personally, and such judgment is not a mere lien on the property for which the promise sued on was given, but is a lien on all her property, and may be executed against anything she possesses. I do not see how this consequence is to be averted, or how it is possible to limit the married woman's responsibility to the property purchased, if it be once admitted that she may make an executory contract to purchase realty.

But that a *feme-covert* can incur this liability on an execu-

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tory contract for the purchase of land, as on a note given for the price, seems in conflict with the opinion of the Supreme Court in the case of *Seitz v. Mitchell*, 4 Otto, 585. Mrs. Seitz, a *feme-covert*, purchased a lot of ground in her own name, and it was conveyed to her. She borrowed the money to pay for it from an insurance company, and gave her notes for the money so borrowed, jointly with her husband; and he also joined her in executing a deed of trust on this and other property to secure them. It can make no difference that the notes were given for money procured to pay for the property, instead of being given directly for the price; nor can it make a difference that her husband united in the notes; nor can it make a difference that a fraud on the husband's creditors was supposed to be intended. The alleged fraud consisted in placing the equity of redemption in the wife's name, when it was intended to be paid for by the husband. But these notes were not fraudulent, and were given for a *bona-fide* indebtedness; and if the *feme-covert* was capable of making a purchase at all, they were her notes; but the Supreme Court said: "For the payment of these notes George Seitz is personally liable, and his wife is not;" thus denying any validity to her executory contract of purchase.

Indeed, it seems to me that if the court had recognized this right, they must have sustained her title; for, as to this property, not a dollar of her husband's means, or even of her own earnings, which belonged to him, had been used in the purchase of the property, but it was paid for by borrowed money, was bought for her separate use, and, so far, no creditor had been defrauded, and under the very terms of our law it ought not to be liable for her husband's debts.

The case of *Sykes v. Chadwick* is supposed to give countenance to the idea that the act of 1869 conferred the power of acquiring by purchase. Sykes and Chadwick, owning property together, desired to sell it, and, as an inducement to Mrs. Chadwick to release her dower, they executed a note to her for \$5,000, on which she afterwards brought suit against Sykes.

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The court made use of one very general expression, which, apart from the context, might be misunderstood. They say, page 148: "By the act of 1869 the plaintiff, as a married woman, acquired the capacity at law to receive property to her separate use, and subject to her separate and exclusive control, as if she were unmarried, provided it does not come to her by gift or conveyance from her husband; by which is undoubtedly meant *voluntary* gift or conveyance. Having this capacity, she did receive and acquire, for a good and valid consideration moving from herself, the promissory notes in question."

This is supposed to countenance the idea that a new capacity of acquiring property is given to the act. But a further view of the case will show that nothing of this sort was intended to be decided, and that the language must have reference to the new capacity of *holding* as a *feme-sole*, and not of *acquiring*; for it is shown in the opinion that the right of the wife to secure a separate provision out of her husband's estate, in exchange for her release of her dower, by even a post-nuptial agreement, had been recognized in equity by the highest authorities; and the court refer to decisions rendered long before any statutes of this kind were passed, sustaining such *post-nuptial* agreements between husband and wife, even as against the husband's creditors, to the extent of the value received by him. The right of Mrs. Chadwick to make this arrangement was derived from this established doctrine of equity, and not at all from the statute; but her right to hold property thus acquired, as a *feme-sole*, was traced to this statute. And inasmuch as she had thus acquired the property in a way recognized before the law passed as valid, and had not derived it from a gift of her husband, her right to sue on the note as a *feme-sole* was sustained. The case, then, is no authority for the proposition that, by implication, the act capacitates a woman for any kind of acquisition of property, other than a gift from her husband. And it does not seem to me that such was its design. It follows from the forego-

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ing considerations that the note sued on here was not a valid contract under our law.

The pleadings do not show where the defendant resides, or where the bond sued on was executed or is payable. We are only left to presume that the contract is to be governed by the law of this place. And if it were otherwise, the law of New York is not in the case by proper averments, so that we could give effect to it.

But it is a fact in the case that the property for which this bond was given is situated in New York. Now, I do not think our statute could, or ever was intended to, operate upon contracts relating to realty in another jurisdiction. It must be borne in mind that a law of this kind is not merely a law touching the personal capacity of the married female, but, as far as it affects real estate, it is also a law touching titles. To illustrate: Suppose we had no such act in force here, but such an act was in force in New York, and a *feme-covert* in New York should undertake to convey or contract away real estate here, simply descended to her as a *feme-sole*. It is plain that she could not do it. No conveyancer would advise the acceptance of such a title, because, by our law of real-estate title, a *feme-covert* could only pass title by deed with her husband, and could not bind the land by contract at all. The New York law of personal capacity would come in conflict with our law of titles, and that of the *situs* must prevail. Now reverse the case, and it is equally plain that no law passed here could endow a woman with capacity to deal with real estate in another jurisdiction, otherwise than is permitted by its local laws, and it is not to be supposed that it so intended. If, therefore, this be deemed a contract in relation to separate property situated in another State, it cannot derive validity from our law. It may be different with personal property, which has no locality but the domicile of the owner.

If, on the other hand, this be deemed a personal contract, and as such invalid under our laws, if it was made here, and this is the domicile of the defendant, which is all that we can

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presume from the face of the record, it would not help the plaintiff's case to show that by the law of New York such a contract would be valid, because the law of the domicile governs as to the capacity of persons to contract there. (Story's Conflict of Laws, 65, 96, 99.)

I am of opinion that the demurrer in this case must be sustained.

Mr. Justice MACARTHUR said, in substance:

I agree that the demurrer must be sustained, for the reason that the declaration affirmatively discloses the facts that the defendant is a married woman, and that her separate estate is situated in the city of New York; but I am unable to concur in the interpretation of our statute, concerning the rights of married women to property, announced in the learned opinions of my brethren. The question arising on this point of difference is whether a married woman can execute a valid contract to pay for property which she acquires by purchase. At common law her bond is void. In this respect the statute has made a radical change, for she can now contract in her own name in all matters having relation to her separate property. She may also acquire real or personal property in any way except from her husband, and there is no other limit to the mode in which she may receive it. The object of the statute was to displace a system of oppressive restraint, to enlarge her power of receiving and disposing of property, and to protect her individual interests the same as if she were an unmarried woman. The same purpose, to a large extent, had been recognized in courts of equity long before this legislation took place. Equity first invented trusts for the separate use of married women, and asserted her power of holding and acquiring property, and as incident to such power her separate estate was held liable for the payment of all debts contracted by her upon its credit. (*Church v. Jacques*, 3 John. Ch. R., 77; 17 John., 548; *Gardner v. Gardner*, 7 N. Y., 112; *Yale v. Dederer*, 18 N. Y., 265; 2 Rope on H. and Wife, 239.) "If a court of equity says a *feme-covert* may have a separate

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estate, the court will bind her to the whole extent as to making that estate liable to her own engagements; as, for instance, for the payment of debts," &c. (*Hulme v. Tenant*, 1 Bro. C. R., 16.) They will not render a personal decree out of deference to the common law; yet in the case just cited the joint bond of a husband and wife was held not only to be valid as to her, but to be a charge upon her separate estate. The same rule was laid down in *Peacock v. Monk*, 2 Ves., 190, and it is there decided that a *feme-covert* acting with respect to her separate property is competent to act in all respects as a *feme-sole*. And Mr. Justice Story observes that in "the earlier cases the doctrine was put upon the intelligent ground that a married woman is as to her separate property to be deemed a *feme-sole*; and therefore that her general engagements, although they would not bind her person, should bind her separate property. This, however, is not the modern doctrine; for by that it seems to turn upon the intention of the married woman to create a charge upon her separate estate, either as an appointment, or of a disposition of it by a contract in the nature of an appointment." (2 Story Eq. Jur., sec. 1401.) To the same effect are *Conroy v. Smith*, 13 Wis., 125; *Hauptman v. Cullan*, 20 N. Y., 243.

The rule in equity that a married woman is to be regarded as a *feme-sole* in regard to her separate estate is established by numerous authorities, and that consequently she may enter into executory contracts, as a bond, note, or mortgage security, with reference to her property, and that this power of contracting was necessarily implied in the power of holding and enjoying a separate estate, and was absolutely indispensable to its beneficial use. If, therefore, a *feme-covert* obtained property by grant or purchase through the expedient of a trustee, it may be assumed that in equity her bond for the payment of the consideration would be good as to her separate estate, if she indicated an intention of contracting in regard to it, or upon its credit, without the authority of any statute. Now, the effect of the statute in regard to the same transaction, under the same circumstances, is to make her

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bond as good in law as it had before been in equity. It is impossible to contend that Congress has not given a married woman the power of contracting in law in any manner that she could under the rules of equity without a statute. Surely if it were not intended to enlarge her capacity, it would at least not be claimed that she is entitled to less aid under the statute than she received by the application of equitable principles before it was enacted. If, for instance, the defendant had purchased the property within this jurisdiction and taken a conveyance to a trustee for her separate use, a court of equity would undoubtedly have made the bond a charge upon her separate estate in any proper proceeding in which it could exercise jurisdiction. It seems to me that the purpose of the Legislature was to give her a legal capacity of contracting as indispensable to her power of acquiring property; and it is a fatal misconception to talk of her acquiring property, as if unmarried, without the correlative power of contracting in the ordinary way.

I am aware that in several of the States having statutes similar to our own, it has been decided that an action at law cannot be maintained upon the obligation of a married woman given upon the purchase of land. (*Yale v. Dederer*, 18 N. Y., 265; 22 Id., 450; *Howe v. Wilder*, 34 Maine, 566; *Jones v. Crossthwaite*, 17 Iowa, 393; *Ames v. Foster*, 42 N. H., 381; *Wooster v. Northrup*, 5 Wis., 245.) These decisions proceed upon the ground that a married woman cannot render herself liable for the payment of property by an executory contract, and that her common-law disability to bind herself personally for the payment of debts has not been removed by these acts of legislation. The courts in New York held, however, that a *feme-covert* purchasing property, but executing no covenant or agreement on her part for its payment, might take and hold the property to her sole and separate use, independent of her husband, although there were no means of compelling her to pay the consideration, and that the transfer would be valid whether she had antecedently any separate estate or not. (*Darley v. Callaghan*, 16 N. Y., 71; and al-

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though the purchase was on credit, *Knapp v. Smith*, 27 Id., 277; *Draper v. Stanvend*, 35 Id., 507.) These rulings were with reference to the acts of 1848 and 1849. Later acts, in 1860 and 1863, authorized a married woman to acquire property by grant, devise, or purchase, and to engage in a trade or business on her own account; so that under the existing statutes in that State a wife may acquire property on credit, and her contracts in relation to such property are as binding upon her and upon her separate estate as if executed by an unmarried woman. Under similar laws in Massachusetts it has been held that a promissory note given by a married woman for land conveyed to her, to her sole and separate use, is a valid contract. (*Stewart v. Jenkins*, 6 Allen, 300.) And there has been the same ruling upon a promissory note given by her for money borrowed to enable her to pay for land, and actually applied by her to that purpose. (*Chapman v. Foster*, 6 Allen, 136.) Cases like these are in conformity to the intention and policy of the law, and the same tendency of liberal construction should be applied here, where the question has not heretofore been raised.

There is nothing in our statute which forbids the right of a married woman to acquire property by purchase, and we are construing it on that point for the first time. I do not think we should allow the decisions in other States to rule our judgment as if binding. They are to be considered with respect, but not as authority; for they relate to local laws, and not to general jurisprudence. Especially we should not lay much stress upon them when they are based more upon the indecorous rules of the common law in regard to married women than upon the spirit and design of recent legislation.

By the statutes of New York, and those of several other States, a married woman may take by gift, grant, or devise. The language of our own is broad enough to include all of these, as well as that of purchase; and there is nothing which excludes the word purchase, any more than of the words gift or devise; and it has been repeatedly held that, under statutes as general in expression as our own, a married woman is

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capable of receiving property by gift or devise. If she can take a conveyance in any mode by which property is acquired, she can in all; for there is no limitation in our statute, except that it is not by gift or conveyance from her husband. This very power implies that she can give an obligation to pay for it. To say that she may take by gift or devise, and not by purchase, is to restrain the plain and ordinary meaning of language. The first impressions that prevailed in New York, that a wife could buy, but could not pay, are unworthy of serious consideration, and were corrected by the Legislature of that State nearly as soon as they were announced. Congress had observed this judicial reluctance to remove common-law incapacity of married women in New York, and the other States which followed her lead, and, quite likely from deliberate purpose, used the language in the statute conferring upon married women the legal capacity of receiving property during marriage in any way, without any limitation but that of the husband. It seems forced and extravagant to say that under this provision she may not take by purchase as well as by gift.

In *Sykes v. Chadwick*, 18 Wall., 141, an action at law by a married woman was maintained on a promissory note given to her by the defendant, who had purchased her dower interest in the real estate of her husband, who also signed the note as a maker. The court held that this note constituted her separate estate, and that by the act of 1869 she acquired the capacity at law to receive property to her separate use, and that she was relieved from the incapacity which the common law imposed upon her, and is as if she were unmarried; that the surrender of her right of dower was a consideration for the note, and that she could maintain an action at law to enforce its collection. It is thus judicially declared by the Supreme Court, in a case that went up from this court, that the statute now in force within this District enabled the wife to dispose of her separate estate by conveyance, and take an executory contract for the purchase-money; and that the technical rules of the common law no longer exist in such

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case. This adjudication goes far to emancipate our statute from the narrow construction to which similar laws have been subjected elsewhere. If a married woman may dispose of her whole separate estate, and take a note for the price, it would seem to follow that she could give the same evidence of indebtedness when she is the purchaser instead of the seller. Is it not capricious to say that a note is good when she receives, but void when she gives it?

But having sufficiently vindicated my reasons why I am unwilling to concur in the views of my brethren in regard to the true meaning of this statute, I have only to repeat, that I concur in the judgment on the ground indicated in the beginning.

DISTRICT OF COLUMBIA v. THE WASHINGTON MARKET COMPANY.

AT LAW.—No. 14,991.

- I. By act of Congress the Washington Market Company was authorized to erect market buildings on ground belonging to the United States, and to hold the same for a term of ninety-nine years, on an annual rental of \$25,000, which money was directed to be paid to the city of Washington for the support of the poor of said city and of the District of Columbia: *Held*, That this was in the nature of a gratuity or bounty to the city, and remained under legislative control, and subject to be reduced or withdrawn entirely by the power that conferred it.
- II. The reduction of such rent might be by an act of Congress expressly directing it, or Congress might accomplish the same end by authorizing the District of Columbia to release or reduce the rent, and this authority might be confided to the District by general words, though not explicitly describing it.
- III. In ascertaining the meaning of an act of Congress, the remarks of members on its passage are too uncertain a source of guidance, and cannot be resorted to by the court for that purpose.
- IV. A trust created for the benefit of "the poor of the city of Washington and of the District of Columbia," is so vague and indefinite as to be incapable of ascertainment, and is, therefore, totally void.

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STATEMENT OF THE CASE.

The first count in the declaration sets forth that on May 20, 1870, Congress passed an act to incorporate the defendant by the name and style of the "Washington Market Company," and provided in such act that, in consideration of the privileges thereby granted, the said company should pay yearly, during the term of ninety-nine years, to the city of Washington, the sum of \$25,000, which sum should be set apart and expended by and under the direction of said city for the support of the poor of said city; that the defendant became indebted to the plaintiff on account of said rent, as the successor of said city of Washington, for a balance due and unpaid of \$173.20 on the 1st day of June, 1871, that being the day on which the late corporation of the city of Washington ceased to exist; and the further sum of \$53,847.23, which was the balance due and unpaid November 1, 1875. The money counts are added, and a bill of particulars is appended to the declaration showing a debit and credit account. To this declaration the defendant filed a plea of not indebted, and a special plea which is set forth at length in the opinion of the court, as is also the demurrer thereto, and the matters of law to be argued under it.

The fourteenth section of the act incorporating the defendant reads as follows:

"SEC. 14. *And be it further enacted*, That, in consideration of the privileges granted by this act to the Washington Market Company, the said company shall pay yearly, every year during the said term of ninety-nine years, unto the city of Washington the sum of \$25,000; which sum shall be received by said city and set apart and expended by and under the direction of the city government of said city for the support and relief of the poor of said city and of the District of Columbia; and said city may enforce the payment of said sum from time to time as the same shall become due, either by an action at law or by the same proceedings now authorized

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by law for the collection of taxes by said city." (16 Stat., 124.)

The real estate vested in said market company for and during the period of ninety-nine years is the whole of the ground on the south side of Pennsylvania avenue and of Louisiana avenue between Seventh and Ninth streets, and running back to B street, and is the property of the United States. The defendant was authorized and empowered to locate and construct suitable buildings on said grounds for a public market, and such stores and public halls as might be determined by said company not inconsistent with the use of said premises as a public market. The defendant accepted the charter and has erected buildings for market purposes on that portion of the demised premises fronting on B street, but has erected no building on the reservation fronting on Pennsylvania and Louisiana avenues.

On the 3d of March, 1873, Congress passed another act, which is embodied in the act "making appropriations to supply deficiencies in the appropriations for the service of the government for the fiscal year ending June 30, 1873, and for other purposes," and will be found in 17 Statutes, 540, as follows:

"For the purchase by the United States of the interest of the District of Columbia in the present city-hall building in Washington, now used solely for government purposes, such money as may be determined by three impartial appraisers, to be selected by the Secretary of the Interior, not exceeding \$75,000, the same to be applied by said District only for the erection of a suitable building for the District offices. And the Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues between Seventh and Ninth streets: *Provided*, That the Government of the United States shall not be liable for any expenditures for said land, or for the purchase-money therefor, or for the buildings to be erected thereon; and no land, or the use thereof, is hereby granted for the

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purpose of erecting any buildings thereon for such building."

On the 18th of March, after the passage of the last-mentioned act, the said defendant and the Governor and Board of Public Works of the District of Columbia entered into an agreement or arrangement by which the market company covenanted to convey to the District of Columbia so much of the land as they had acquired under the act of Congress of May 20, 1870, as fronted on Pennsylvania and Louisiana avenues, for the purpose of erecting thereon suitable buildings for District offices, in consideration of which the District assumed to fulfill all obligations imposed upon the company by section 14 of the above act of Congress, as modified by an act of the Legislative Assembly, which reduced the amount to be paid by the defendant from \$25,000 to \$7,500. The action is brought to recover the difference between these amounts for the period already specified. It is believed that this statement comprehends all the facts bearing upon the demurrer, in addition to those contained in the opinion.

The case was certified to be heard in the general term in the first instance.

A. G. Riddle, for plaintiff.

Joseph H. Bradley, B. F. Butler, Matt H. Carpenter, and William E. Chandler, for defendant.

Mr. Justice HAGNER delivered the opinion of the court:

The case is one of great importance, as well by reason of the amount claimed as because of the numerous and interesting questions involved. These have been argued with great ability, and they have received the careful consideration their importance demanded.

The action was commenced in November, 1875, in the name of the District of Columbia against the Washington Market Company. The declaration contained two special counts, and the usual money counts for money payable, &c. In the first count the pleader undertakes to set out the four-

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teenth section of the act of Congress of 1870, incorporating the market company. With this declaration was filed a bill of particulars claiming a balance due the District of over \$53,000.

In January, 1876, the defendant filed a general plea of not indebted, and in April following a special plea in the following words:

"And for a further plea, the defendant says that subsequent to the passage of said act of Congress of the 20th of May, 1870, that is to say, on the 3d day of March, 1873, the Congress of the United States passed a further act, appropriating such sum for the purchase by the United States of the interest of the District of Columbia in the city-hall buildings in Washington, then used solely for government purposes, as might be determined by three impartial appraisers, to be selected by the Secretary of the Interior, not exceeding seventy-five thousand dollars, the same to be applied by said District only for the erection of a suitable building for the District offices; and in and by said act the Governor and Board of Public Works of the said District were authorized, if they deemed it advisable for the purpose of the erection of such building, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues between Seventh and Ninth streets, which land so authorized by said act to be procured was a portion of the land granted to the defendant company by said act of May 20, 1870, in consideration of which said sum of twenty-five thousand dollars was to be paid annually to said city of Washington; that subsequently, that is to say, on the 18th day of March, 1873, in pursuance of said act of Congress of March 3, 1873, an agreement was entered into by said District of Columbia, represented by said Governor and Board of Public Works, with said defendant company, by which, among other things, said company agreed that it would by quitclaim deed release and convey to said District, for the purpose of the erection of said District building thereon, all the right, title, and interest of said company acquired under said act of May 20, 1870, in and to so much

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of the land described in said act, and fronting on Pennsylvania and Louisiana avenues between Seventh and Ninth streets, as was described in said agreement, being a piece of eighty-six feet in depth along said avenues and between said streets; and said defendant company also agreed to convey to said District the right to use in common with said company, as a passage-way and court-yard, all the land between the said land so to be released and conveyed as aforesaid and a line drawn from Seventh to Ninth street, ten feet north of the Seventh and Ninth street buildings of said market company; that in and by said agreement the said District of Columbia, among other things, in consideration of the aforesaid release and conveyance by said defendant company, agreed with said company that said District would assume and fulfill all obligations imposed upon said company by section 14 of said act of May 20, 1870, (as modified by an act of the Legislative Assembly of the District of August 23, 1871,) except as follows: That the market company should pay annually to the District, during the term and for the purpose mentioned in said section 14, the sum of seven thousand five hundred dollars, payable quarterly, which sum should, during said term, be in the place of all rental for the ground occupied by the market buildings of said company; and that in case in any year the general District taxes upon said ground and market buildings should exceed five thousand five hundred dollars, the excess above that amount should be deducted from said rental of seven thousand five hundred dollars, so that the total annual payments for rental and taxes should not exceed thirteen thousand dollars; that it was also provided in said agreement that possession of the land conveyed should be given the District upon the day of executing said agreement; that said agreement should take effect April 1, 1873, and that the defendant company should at once settle its past rental account to said April 1, at the rate after August 23, 1871, fixed by the resolution of the Legislative Assembly of that date, and should immediately pay the balance due to the treasurer of said District; that in pursuance of said agree-

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ment of March 18, 1873, said defendant company, by deed of release of that date, conveyed to said District all said company's interest in said land and privileges as in and by said agreement was required, which said deed was duly accepted by said District and recorded, possession of said land was delivered to and taken by said District, and the work of erecting said District building commenced by said District, and possession of said land has ever since been and now is retained by said District; that the value of the interest of the District in said city-hall building having been determined by appraisers selected by the Secretary of the Interior, under said act of March, 1873, at seventy-five thousand dollars, said sum was duly paid by the United States to the District, was accepted by the District Legislature, and said Legislature, by act of June 26, 1873, appropriated said sum and fifteen thousand dollars in addition, making ninety thousand dollars in all, to be drawn by the Board of Public Works for the erection of said building for District offices, from which appropriation payments were made for the work of erecting said building on said land as aforesaid; that under the aforesaid act of May 20, 1870, there was granted to said defendant company all the land fronting Pennsylvania and Louisiana avenues between Seventh and Ninth streets, and extending southerly to the middle of B street, before that time known as reservation 7 or Centre Market space, with the provision that on the rear of said grounds should be erected public market buildings, and that on the front grounds should be erected a building to be rented by said company for stores, offices, and other lawful purposes, to be determined by said company; that prior to said agreement of March 18, 1873, said market buildings were duly erected and opened and occupied as required by said act of May 20, 1870; that said front grounds were valuable to said company for the purpose of erecting said building for rental as aforesaid, and its rights therein were released and conveyed to said District only at the solicitation of the District officers, in pursuance of said act of March 3, 1873, and in consideration of said agreement by said District

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to assume and fulfill all obligations imposed upon said company by said section 14 of said act, except the payment by said company of said annual sum of \$7,500; that immediately upon the execution of said agreement of March 18, 1873, said defendant company settled its past rental account and paid all amounts due to said date, and that since said date said company has duly paid to said District said sum of \$7,500 annually, as required by said agreement.

"Wherefore, and by reason of all which the premises, the defendant says that the plaintiff ought not to be admitted to say as in declaring said plaintiff has alleged."

The plaintiff filed a demurrer to this special plea, and a note of the matters of law intended to be argued under it, as follows:

"1. That the act of the Legislative Assembly in said plea mentioned does not reduce the annual rental required by act of Congress to be paid by the defendant.

"2. That the Legislative Assembly had no authority to so reduce said annual rental.

"3. The defendant did not and could not make a valid conveyance of the land alleged in said plea to have been conveyed by the defendant to the plaintiff; said land being held by the defendant under a statutory lease from the United States, and subject to certain trusts.

"4. Neither the Board of Public Works nor the District of Columbia was authorized by the act of March 3, 1873, in said plea mentioned, to buy the land alleged in the plea to have been bought from the defendant, the reversion of said land being in the United States."

The scope of the argument extended beyond these four causes, and as the parties evidently desire a decision upon all the points raised, we propose to examine them in their due order.

First. Did Congress possess the constitutional power to reduce the rent exacted by section 14 of the act of 1870?

It is important to consider the situation of this property when this act was passed. This reservation then belonged

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exclusively to the United States. According to the decision in *Van Ness v. City of Washington*, 4 Peters, the United States possessed it free of all trusts, untrammelled by all conditions, with the right to do with it whatever any private proprietor in the city could do with his land, or whatever the United States could do with any other government lands. It could, therefore, have *sold* it and placed the proceeds in the public treasury. It could have *given it away absolutely*, as it has given away millions of acres to railroads, to meritorious officers and soldiers, or to any charitable object. As a matter of course, therefore, it could *lease* it, reserving such annual rent as it should see fit to claim, from \$100,000 to \$25,000, or for a consideration as insignificant as the two Indian arrows—the price of the grant of Maryland from Charles II. It could make *that rent* payable either directly into the treasury, or to a private individual, or to an appointee for the use of any beneficiary it might select, as it did in this case. It cannot be denied that if the rent had been reserved, *payable directly into the treasury*, Congress might afterwards have reduced or released it, as a private person might release a rent payable to himself. Does the fact that by the act of Congress itself the market company was directed to pay the money to the city of Washington, remove the rent beyond control of the power that created it?

It must be admitted that the reservation of the rent to the city was a mere *gratuity* on the part of Congress towards this municipality, bestowed *without the slightest consideration* moving from the city to the United States—as purely a *bounty* as were any of the royal grants to the colonial territories by the “special grace, certain knowledge, and mere motion” of the English kings; and it is well settled that bounties are within legislative control, and always subject to be withdrawn by the power that conferred them. Of this character are the pensions granted by Congress, or appropriations for charities, which are subject at all times to be withdrawn by the sovereign, however severely such withdrawal might operate upon individuals. By law, goods seized for violations

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of the customs duties are liable to forfeiture; and to stimulate vigilance on the part of the revenue officers, a valuable part of the forfeiture is assigned to them. But as the Secretary of the Treasury is authorized, in his discretion, to remit the penalty, the Supreme Court has held that his remission also releases the share of the collector; and that there can be no such vested right in him as to his moiety as may not be fully destroyed by the act to the government.

An illustration of this principle, as affecting individuals, is afforded by the decision in *Salt Co. v. East Saginaw*, 13 Wall., 373.

But there is a special reason why this right to destroy or diminish a gratuity applies where a *municipality* is concerned.

A city is one of the public territorial divisions of the country, established for public political purposes connected with the administration of the government. It is one of the instruments of government, invested with local jurisdiction to aid in the administration of public affairs. Such a municipality is *always* the subject of legislative control as to its duration, powers, rights, and property. In a *public* capacity only could it receive this money, to be used by it for public purposes only. From numerous cases at hand, uniformly maintaining this proposition, I will refer to a decision in Maryland, of *Hagerstown v. Sherer*, 37 Md., 180.

In this case the court, in discussing this subject, say:

"The case of *The State, use of Washington county, v. B. & O. R. R. Co.*, 12 G. & J., 299, is a very instructive one as to the power the Legislature may exercise over the supposed rights of such corporations. The Legislature, in an act to promote internal improvements, had inserted a proviso, that if the railroad company did not locate their road so as to pass through Hagerstown, they should forfeit \$1,000,000 to the State, *for the use of Washington county*. The company failed to make the designated location, and suit was then brought against them in the name of the State, for the use of the county, to recover this sum. The Legislature then passed an act releasing this forfeiture. The validity of this latter act was

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assailed, but was sustained by the court. * * * In that part of their opinion where they treat the case as one of contract and not of penalty, they say, in this view of the case, 'it is material to consider who are the contracting parties, and in what relation does the *cestui que use* stand to the legal plaintiff on the record. The contracting parties are the State on the one part and the railroad company on the other. The considerations of the contract were the franchises and privileges derived by the company from the State, and the *cestui que use* is one of the counties of the State, claiming an interest, incidentally, in her political character and capacity, in virtue of one of the provisions contained in that contract.'

"The State, for reasons which she deemed sufficient, has thought proper, by an act of her Legislature, to *annul the contract and release the claim* of the *cestui que use*, which this action has been instituted to enforce. In doing so the Legislature have not transcended their constitutional limits. Washington county, by which the claim is intended to be enforced, is one of the public territorial divisions of the State, established for public purposes connected with the administration of the government. In this character she would receive the money as public property, to be used for public purposes only, and not for the use of her citizens in their private characters and capacities. In that relation they would have no immediate interest and could assert no title. * * * If, then, it be public and not private property, it would seem to be completely at the disposal of the government, and the act of 1840 was nothing more than a rightful exercise of legislative power."

This judgment was affirmed by the Supreme Court in 3 Howard, 534, where it was held, that by the repealing act the Legislature had dealt altogether with matters of *public* concern, and had interfered with no *private* right, because neither the county commissioners nor the county, nor any one of its citizens, had acquired any separate or private interest in this money which could be maintained in a court of justice.

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If further countenance for the exercise of the right were needed, it might be gathered from the provision in section 17 of the charter of the market company, reserving the right of Congress to legislate in respect to said property, and from the opinion of the Supreme Court in *Welch v. City Collector*, not yet reported.

We have, therefore, no doubt that Congress did possess the power to reduce the rental. It must be admitted that it was not essential that this reduction should be made by *an act of Congress* and by explicit words. Congress might equally accomplish the end by authorizing the District of Columbia, the successor of the city government, to release or reduce the rents, and this power might be confided to them by *general words* large enough to comprehend the powers, *though not explicitly describing it.* (*Welch v. City Collector*, *supra.*)

Second. The question then arises: Did Congress confer such authority upon the District government?

It is claimed on the part of the market company that the authority is given to the District government by the act of Congress of March 3, 1873, while the counsel for the District insists that this act confers no such authority.

The language of the section applicable to this point is as follows:

“For the purchase by the United States of the interest of the District of Columbia in the present city-hall building in Washington, now used solely for government purposes, such sum as may be determined by three impartial appraisers, to be selected by the Secretary of the Interior, not exceeding \$75,000, the same to be applied by the said District only for the erection of a suitable building for the District offices; and the Governor and Board of Public Works are authorized, if they deem it advisable for that purpose, to make arrangements to secure sufficient land fronting on Pennsylvania and Louisiana avenues between Seventh and Ninth streets: *Provided*, That the Government of the United States shall not be liable for any expenditures for said land, or for the purchase-money therefor, or for the buildings to be erected there-

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on; and no land, or the use thereof, is hereby granted for the purpose of erecting any building thereon for such building." (17 Stats., 540.)

It has been insisted in the argument that the court, with a view to a clearer understanding of the language used in the section, is at liberty to consult the record of the debates in the houses of Congress while this section was under discussion. It is true that the courts, in the examination of certain constitutional questions, have at times referred to the essays in "The Federalist" written by the great founders of the instrument, contemporaneously with its submission to the people, and have cited the opinions of those eminent men in support of their conclusions. It is also true that in New York and in some other States it has been considered proper to examine the journals of the Legislature to ascertain whether a particular measure received the two-thirds vote required by the State Constitution for that class of laws. But we have seen no authority that would justify us in appealing to so uncertain a source for guidance as the remarks of members in debate. It is well known that a measure is sometimes advocated by a person upon grounds which another may assign as the cause of his opposition; and in this case there can be no more striking proof of the fallacious character of such evidence than the fact that both sides refer to different portions of the same debate in support of their respective views.

If reference were to be had to any portion of "The Congressional Record," it would be more justifiable to examine the amendments proposed to the section by different members, and, among them, to the proposal of Mr. Beck, of Kentucky, that no money should be expended upon the property selected by the Governor and Board of Public Works until authority should be first given by Congress, after a report to that body. This amendment was rejected; but it may be urged with equal plausibility, on the one hand, that Congress rejected it because it determined to vest the final power in the city authorities; and on the other, that the reason for the rejection was the belief that the law only authorized an in-

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quiry or preliminary treaty about the land. We are therefore forced to examine the language itself, unassisted by extraneous aids.

It is evident that the principal matter sought to be provided for *was the erection of the building*; but the power to accomplish this is not granted by direct language. It is also evident that the act contemplated the possibility of some "expenditure for the land," and "payment of purchase-money therefor," for it expressly takes pains to declare that the United States shall not be liable for either. The particular phrase which has been the great source of discussion, declares that the Governor and Board of Public Works are authorized, if they deem it desirable for the purpose, "to make arrangements to secure sufficient lands," &c.

It is insisted by the counsel of the District that the words "make arrangements" only imply the grant of power to make a treaty or bargain as to the price, terms, &c., and to report their action to Congress; and definitions are read from an eminent lexicographer, (a justifiable source of reference,) which ascribe this signification to the word "arrangement." But the same high authority gives the following as one of the significations: "*Arrangement*—final settlement; adjustment by agreement; as, the parties have made arrangements between themselves concerning their dispute;" and it is added that this is "a popular use of the term." Now, if we substitute this definition where the word occurs in the act, the sentence will read thus: "The Governor, &c., are authorized to make a final settlement, or adjustment, by agreement, to secure sufficient land," &c.

With this sense—the popular sense, we are told—given to the word, the phrase would certainly confer an authority upon the District of Columbia to take all needful steps to consummate the acquisition of the described territory, even to the extent set forth in the plea. The propriety of adopting this form of expression in the act of Congress, instead of directing the District government to buy the land, can readily be appreciated when we reflect that any mandatory direction to

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purchase would have committed the District to place the buildings on the lots, however extortionate might be the demand of the market company as to the price.

It is difficult to understand why Congress should have desired the delay of another year for the return of the report and further congressional action, in view of the fact that the power of acquiring this parcel of land was not one of very uncommon importance, not greater than similar powers constantly conferred by individuals upon private agents, and not comparable in consequence to the immense powers previously and subsequently confided by Congress to the District government with unstinted hand, and in virtue of which millions of money were expended, and the whole face of the city changed and leveled.

To show that the courts construe such powers liberally and in aid of the object of the grant, we refer to *Van Ness v. City of Washington*, 4 Peters, 280; *City of Georgetown v. Alexandria Canal Company*, 12 Id., 97; *Washington Corporation v. Great Falls Manufacturing Company*, 21 Md.

In the last-named case it appeared that an act of the Legislature of Maryland declared, "that if the plan adopted by the President of the United States for supplying the city of Washington with water should require said water to be drawn from any source within the limits of the State, consent is hereby given to the United States to purchase such lands, and to construct such dams, reservoirs, buildings, and other works, and to exercise, concurrently with the State of Maryland, such jurisdiction over the same as may be necessary for the said purpose."

In constructing the Washington aqueduct, it was found necessary to build a dam across the Potomac River at a point where the land on both banks belonged to the Great Falls Manufacturing Company. After the building of the dam the Great Falls company obtained from the State of Maryland patents for the land at the bottom of the river, upon which the dam was built, and it was insisted that it was entitled to payment from the United States, in respect of the

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land thus patented and used by the aqueduct. The Court of Appeals, however, held that the act of the Legislature conferred upon the United States rights of acquisition of the lands necessary for the construction of the aqueduct, which the State was not at liberty to impair by acts of its public officers, and that the United States by its priority of location had secured a priority of right, which must prevail against the subsequent patentee.

In the case in 12 Peters, 97, the court, in like manner, held that the power to build a viaduct to carry the Alexandria canal across the Potomac River at Georgetown, was sufficiently conferred by an act of Congress authorizing the canal company to construct their canal from the terminus of the Chesapeake and Ohio Canal to the city of Alexandria.

We therefore conclude that Congress did, by the fair interpretation of this section of the act, intrust to the District government the power to adopt and *conclude* all requisite measures to acquire the land described in the law as the site of the contemplated public buildings.

Third. The next question is: Did the city authorities exercise this power in the manner authorized by the law?

What the authorities actually did is averred by the plea and admitted by the demurrer. They acquired by deed from the market company the parcel of land, 86 feet in depth, described in the plea, and in consideration of this grant they agreed to reduce the rental to \$7,500, in the manner specified in section 2 of the agreement.

Their power to acquire this land is denied by the plaintiff, who claims that these acts on its part were *ultra vires* and void.

In considering the power of a municipal corporation to do any act appearing to have been performed in the direction of the public welfare, the courts are not inclined to construe its powers parsimoniously, and scrutinize and restrain them within the strictest limits; but they will expound them liberally, to effect the valuable public purposes intrusted to it by the Legislature.

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In *Glenn v. Mayor and City Council of Baltimore*, 5 G. & J., 424, the court hold this language: "A municipal corporation has power to pass all laws necessary or proper to carry into effect any given power, and the degree of their necessity or propriety should not be minutely scrutinized." And the doctrine of *ultra vires*, when invoked by a municipality to enable it to avoid its own solemn engagements, is rightly discountenanced by the courts. It is well for the honor and safety of the nation that its highest court, in unmistakable terms, has reiterated its determination to maintain the faith of contracts entered into by corporations, and especially by municipalities, where the only defense interposed is the allegation by the city that it misled others by exercising powers it now insists it did not possess. Unless such defenses were listened to with great caution, it might result in each successive government of a municipality in turn endeavoring to repudiate the acts of its predecessor, and thus the board that sought to evade the entire contract as *ultra vires*, might in turn be denounced as having usurped authority in seeking its disaffirmance.

A *release* of part of the rent was the most obvious mode of accomplishing the acquisition of the property. It would have been a most extraordinary arrangement for the corporation to have paid out money for the land to the market company, and for the market company to have continued to pay the entire original rental, after having parted with a large part of the reservation to the city.

That the municipality had the power to receive the land and execute the release, in our opinion, is fully sustained by the authorities.

A case strikingly maintaining this view of the power of the corporation to execute this release, is *Visitors, &c., of St. John's College v. Purnell, Comptroller, &c.*, reported in 23 Maryland, 629.

In 1784 St. John's College was incorporated by the State of Maryland. By the act of incorporation it was declared that in consideration that certain public-spirited individuals

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had subscribed a large sum of money towards founding a college, the State of Maryland bound itself to pay annually, and forever thereafter, as a donation by the public to the use of the said college, the sum of £1,750, "to be applied by the visitors and governors to the payment of salaries to the principal, professors, and tutors," &c., and the act proceeded to dedicate to the payment of this annuity a sufficient amount from the sums to be received into the treasury from licenses.

In 1805 the Legislature passed an act declaring this provision of the charter repealed. In 1832 a resolution was passed by the Legislature declaring that thereafter there should be paid annually to the visitors and governor the sum of \$3,000, *on condition* that this annuity should be accepted by them in full satisfaction of all legal or equitable claims they might have or be supposed to have against the State under the original law; and requiring them to file an acceptance of these conditions with the clerk of the Court of Appeals, and the college authorities executed an instrument under their corporate seal agreeing to accept the annuity in full satisfaction of their claims; and it was paid to the college for many years thereafter.

In 1860 the visitors and governor sued out a mandamus to compel the officers of the treasury to pay out the money received from licenses, the original annuity of £1,750, from the time it was withdrawn, averring that the attempted repeal in 1805 was void as against the provisions of the Constitution of the United States forbidding a State to pass any law impairing the obligation of a contract, (as had already been decided in 15 Md., 330,) and insisting further that the release executed by the college authorities in 1832 was *ultra vires* and void.

After the fullest argument by counsel, the Court of Appeals decided that the visitors and governor were competent to execute the release, and that they were concluded thereby, and could not maintain their action.

We are thus led to the conclusion, which is concurred in by all the members of the court who heard the cause, that

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the defenses interposed by the special plea and admitted by the demurrer constitute a bar to this action.

The questions we have examined are all that properly arise in the consideration of the case presented by the pleadings. With the consideration so much discussed in the argument, as to the alleged unwisdom or imputed imprudence of the arrangement, this court can have nothing to do. This is not an application to a court of equity on the part of the city to reform an overreaching bargain imposed upon inexperience or ignorance. It is an action brought by one party for a stipulated rent, upon a contract which the defendant alleges has been lawfully changed by a subsequent competent agreement between the original contracting parties. The only question for the decision of this court, therefore, is whether this subsequent agreement was entered into by competent authority as alleged. Our province is simply to declare the law as, in our judgment, we find it to be.

But it may not be amiss for the court to say that we fail to discover some of the apprehended evils which, it was urged, would result to the city from its settlement with the market company. There is nothing whatever in the negotiations which could be construed as committing the District to erect buildings in the form contemplated by the original charter of the market company. The agreement simply operates to reduce the rental to be paid by the market company to \$7,500, or to such lesser sum as, with the taxes on the company's property, will amount to \$13,000 per annum. It creates no obligation, as we construe it, upon the part of the District of Columbia to raise by taxation the \$17,500—the difference between the original and reduced rental—for the use of the poor of the District and the city; for, even if the District of Columbia were effectually substituted for the market company in the fourteenth section of the charter, the operation of the section would then simply be to require the District to pay the money to the District itself, which would work an extinguishment of the rent, upon the principle that where the lessee acquires the fee the rent ceases, and the

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leasehold title is merged in the fee. (See *Cook v. Brice*, 20 Md.)

We go further, however, and declare as our opinion that if this were not so, and if the District of Columbia could be held liable to raise the money annually, in a case where the trust was one which could be enforced by law, yet that there could be no such obligation in the present case, where the designation of the beneficiaries, "the poor of the city of Washington and of the District of Columbia," is so vague and indefinite as to be incapable of ascertainment, and no persons could show title to claim the benefit of the fund in succession. According to the law governing this District at the time of its cession, such a trust was totally void, as it was in England after the statutes of mortmain, and until the passage of the 43d of Elizabeth concerning charitable uses.

It is settled beyond dispute in Maryland that the statutes of Henry VIII were always in force in that province and State, and they have been reiterated in spirit by the bill of rights of every constitution since the year 1776; and that the statute of Elizabeth never was adopted nor its principles recognized there. (See *Wildeman v. Mayor, &c., of Baltimore City*, 8 Md., 551; *Lingan v. Carroll*, 3 H. & McH., 333, decided in 1793; *Means v. Marche*, 30 Md., 142; *Barnes v. Barnes*, 3 Cranch C. C., 269; *Baptist Association v. Hart*, 4 Wheat., 1; *Beatty v. Kurtz*, 2 Pet., 566.)

These views are not inconsistent with the decisions of the Supreme Court upon the different state of facts appearing in *Inglis v. Sailor's Snug Harbor*, 3 Pet., 113; *Girard's Will*, 2 How.; *Ould v. Washington Hospital for Foundlings*, 1 MacArthur, 541; and *Fontain v. Ravenel*, 17 How., 394.

Upon these grounds the court have unanimously determined that the judgment of the court in special term overruling the demurrer should be affirmed.

Several of the objections insisted on in the argument, but which could not properly be considered under the demurrer—as, that the land selected was not that described in the act of Congress; that it was not a suitable place, &c., together with

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any other defenses that the able counsel of the plaintiff may decide to present—may be insisted on by replication to the plea, if they are so advised.

It is a satisfaction to the court to know that whatever errors we may have fallen into may be the subject of review by the highest tribunal in the land.

JOHN A. J. CRESWELL, ROBERT PURVIS, AND ROBERT
H. T. LEIPOLD, COMMISSIONERS OF THE FREED-
MAN'S SAVINGS AND TRUST COMPANY, v. FREDER-
ICK A. HOLDEN, THOMAS W. MILLER, ET AL.

AT LAW.—Nos. 16,223, 16,222, AND 16,919.

- I. The Maryland act of November, 1798, chapter 24, for the establishment of vestries for each parish, is in full force as the law of this District, and by its express language the vestrymen of every parish for the time being constitute a corporation.
- II. Promissory notes signed by eight persons styling themselves "Vestrymen of St. James' Parish," which notes were given on the purchase of real estate for the use of a parish regularly organized under the act of 1798, are to be considered the notes of the corporation, and not of the individuals describing themselves as vestrymen.
- III. The ancient rule, which required a seal to be affixed to every contract of a corporation, has been dispensed with in modern times, except in regard to deeds and other instruments of a solemn or formal character, and the promissory note of a corporation, signed by the proper officer, is binding upon the corporation and not upon the officer.

STATEMENT OF THE CASE.

These three cases arise upon three notes given by the Vestry of St. James' Parish of Washington, District of Columbia, for the purchase-money of property bought by the parish for church purposes.

The other facts are sufficiently stated in the opinion.

Enoch Totten, for plaintiffs.

Thomas W. Miller, for defendants.

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Mr. Justice WYLIE delivered the opinion of the court :

These several actions having been brought by the plaintiffs against the defendants on as many promissory notes, all of the same date and for like amounts, and the several issues involving the same questions, the cases were consolidated and tried together.

The following is a copy of one of these notes :

“ WASHINGTON, D. C., November 1, 1873.

“ \$550.00. [Secured by deed of trust.]

“ One year after date we promise, for ourselves *and our successors*, to pay to Charles A. McEuen, or order, five hundred and fifty dollars, value received, at the National Metropolitan Bank, with interest until paid, at the rate of eight per cent. per annum, payable semi-annually.

“ FREDERICK A. HOLDEN, THOMAS W. MILLER,

“ CHARLES MARSHALL, GEORGE W. FRANCIS, JR.,

“ WILLIAM GRINSTED, JOHN B. G. BAXTER,

“ GEORGE AUGERTON, J. E. ENGLE,

“ *Vestrymen of St. James' Parish.*”

The interest on one of these notes is credited to May 3, 1876, by an endorsement of McEuen, made 15th July, 1876. The note was then overdue, and was probably in McEuen's hands.

Interest on the other notes is credited, by similar endorsements, to May 3, 1874.

No evidence seems to have been given as to the date when these notes were transferred to the present holders, or whether they were all transferred at the same time, or at different times, or for what consideration.

Plaintiffs' counsel having proved the execution of the notes, and McEuen's endorsement of them, gave no further evidence, relying upon his *prima-facie* case thus made out.

This court has judicial knowledge, however, of the act of Congress approved June 20, 1874, which made provision for winding up the affairs of the Freedman's Bank, as of an insolvent institution, and for the appointment of commissioners for that purpose. We are apprised, also, from the passage

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of several subsequent acts, as well as from public reports made by the commissioners, that, in fact, the Freedman's Bank did fail immediately after the passage of the act of 20th June, 1874, and that it had been insolvent for a long period anterior to that date.

It seems to be certain, therefore, that at least one of these notes, and probably all of them, were in the hands of McEuen at the time of the bank's failure in June, 1874, and were not transferred till after the maturity of two of them.

What effect these circumstances might have upon the rights of the parties in the present controversy, is not a matter for consideration at present, but, as the case is to go back for another trial, we have thought it well to mention them.

The notes were given as consideration for several lots of land in this city which the defendants purchased from McEuen for the use of the Parish of St. James' Protestant Episcopal congregation.

The deed from McEuen bears date the 10th of November, 1873, and conveys the title to the defendants as "The Vestry of the Parish of St. James in the said city of Washington," warrants the title, and contains the usual covenant for further assurance.

On the same date these same grantees executed their deed of trust, in their capacity as the vestry of said parish, to William H. Ward, to secure the notes which had been given for the purchase-money. This deed of trust contains the following recital:

"Whereas the said parties of the first part, being indebted to Charles A. McEuen in the sum of sixteen hundred and fifty dollars (\$1,650), *being for the purchase-money of the piece or parcel of ground or real estate hereinafter described*, have made, signed, and delivered to Charles A. McEuen three certain promissory notes, bearing date on the first day of November, in the year of our Lord one thousand eight hundred seventy-three, each for the sum of five hundred and fifty dollars, and made payable with interest, at the rate of eight per cent. per annum, payable semi-annually, to the order

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of Charles A. McEuen, in one, two, and three years after date respectively; and in order to secure the payment of said notes and the said interest, the said parties of the first part have executed these presents."

Other parts of deed, by the use of the word "successors" instead of heirs, show that these parties in the whole transaction intended to act, and were understood by McEuen to be acting, in their capacity as representatives of the parish, and not for themselves personally.

Defendants then gave evidence showing, or, at least, tending to show, that previously to the date of these deeds and notes the Parish of St. James, in the city of Washington, D. C., had been organized, and that defendants had been elected vestrymen of the parish, in accordance with the canonical requirements of the Protestant Episcopal Church of the Diocese of Maryland, of which the District of Columbia was a part. No exception appears to have been taken by the plaintiffs' counsel to the introduction of this evidence, and the evidence showed that the parish had been regularly organized, as required by the canons of the church and the act of 1798, chapter 24.

No further evidence was given on either side. The court thereupon instructed the jury to find a verdict in favor of the plaintiffs for the amount due upon the notes, to which instruction defendants' counsel excepted.

Subsequently, a motion in arrest of judgment was entered on the part of defendants, which, after argument, was overruled by the court and judgment entered upon the verdict in each case, and defendants again excepted.

The act of Maryland of November, 1798, chapter 24, is entitled "An act for the establishment of vestries for each parish in the State," and contains thirty-four sections.

The twenty-eighth section declares "that the *vestrymen* of every parish in this State, *for the time being*, shall be, and they are hereby declared to be, one community, corporation, and body politic forever, by the name of the vestry of the parish to which they severally belong, and by the same name they and

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their successors shall and may have perpetual succession, and shall and may at all times hereafter *be persons* able and capable in law to purchase, take, and hold, to them and their successors, in fee, or for any less estate or estates, any lands, tenements, hereditaments, rents, or annuities, within this State, by the gift, bargain, sale, or devise of any person or persons, bodies politic and corporate, capable of making the same, and such lands, tenements, or hereditaments to rent or lease in such manner as they may judge most conducive to the interests of their respective parishes, and also to take and receive any sum or sums of money, and any kind of goods and chattels, which may or shall be given, sold, or bequeathed unto them by any person or persons, bodies politic or corporate, capable to make a gift, sale, or bequest thereof, and to apply the same for the use of their respective parishes, as hereinbefore directed; provided, that the clear yearly value of the estate of any vestry (exclusive of the rents of pews, collections in churches, funeral charges, and the like) shall not exceed two thousand dollars."

Section 9 declares "that the vestry of each parish, for the time being, as trustees of the parish, shall have an estate in fee-simple in all churches and chapels, and in all glebes and other lands, and shall have good title and estate in all other property heretofore belonging to the Church of England, or which shall hereafter belong to the said church, now called 'The Protestant Episcopal Church in Maryland;' and it shall be lawful for such vestry so to manage and direct all such property as they may think most advantageous to the interests of parishioners, and they shall also have the property in all books, plate, and other ornaments belonging to said churches and chapels, or any of them."

Section 31 confers on the vestries the power of purchasing at any time a quantity of land, not exceeding two acres, for a burial ground, or site for a church, or parsonage, &c.

By the first section of the act of Congress approved 27th February, 1801, entitled "An act concerning the District of Columbia," it was declared "that the laws of the State of

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Maryland, as they now exist, shall be and continue in force in that part of the said District which was ceded by that State to the United States, and by them accepted as aforesaid."

This statute of 1798 was at that time in force in Maryland, and thus became the law of this District. It has never been repealed. On the contrary, it was recognized as being the law by an act of the late Legislature of the District, approved June 27, 1873, entitled "An act for the relief of parishes of the Protestant Episcopal Church in the District of Columbia," which was itself ratified by act of Congress approved March 28, 1874, ch. 72. It was also recognized, and one of its provisions enforced, by a decision of the late Circuit Court of this District in *Mauers v. The Vestry of St. John's Parish*, 4 Cr. C. C. R., 116.

By the express language of this act, each parish vestry is constituted a corporation—or, rather, in the terms of the act itself, "the *vestrymen* of every parish, for the time being," constitute a corporation. In the present case, therefore, the notes in question are the notes of the corporation itself, and in this respect differ materially from promissory notes signed by individuals describing themselves as agents. This distinction was remarked by the court in *Brockway v. Allen*, 17 Wend., 40.

In that case the law is thus stated: "Where individuals subscribe their proper names to a promissory note, they are presumptively personally liable, though they add a description of the character in which the note is given; but such presumption of liability may be rebutted by showing that the note was, in fact, given by the makers, as a corporation, for a corporate debt due the payee with his knowledge." (*Mann v. Chandler*, 9 Mass., 335; *Burlow v. Congl. Society*, 8 Allen, 460.) The ancient rule, which required a seal to be affixed to every contract of a corporation, has been dispensed with in modern times, except in regard to deeds and other instruments of a solemn and formal character. The promissory notes of a corporation, signed by the proper officer, are binding on the corporation, and not upon the officer. (Angell

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and Ames on Corp., ch. 8.) The author of this work says that the rule which required the acts of a corporation to be under seal, is now entirely exploded; and it is well settled that the acts of a corporation, evidenced by a vote written or unwritten, are as completely binding on it, and are as complete authority to its agents, as the most solemn acts done under the corporate seal.

In the present instance the notes are signed by eight persons styling themselves "Vestrymen of St. James' Parish." They are joint notes—not joint and several—thus showing that the notes were the acts of one body, as it were. Then the promise is "for ourselves and our successors"; that is, for ourselves as a corporation and our successors as a corporation. These words are not the language appropriate for a personal obligation, but are most fitting for an official act. Then, also, the face of the notes contains the words "secured by deed of trust." The deed of trust was recorded, and notice to the world that this security for the notes in question was given by the makers, in their official capacity, for the purchase of property for St. James' parish.

But, more than this, these vestrymen jointly composed a body politic and corporate under the act of 1798 and the proceedings of the ecclesiastical authorities in organizing the church of this parish. They thus acquired the right to purchase the property, and the right also to make the notes and the deed of trust for the purchase-money. The notes as signed are signed by that corporation as effectually as though they had been impressed by its seal (if there were one). If a corporation may make a note without a seal, how else could these notes have been executed by these eight persons, who constituted the whole corporation, than by all uniting in a joint act, and describing themselves officially, so that all might know they were performing a corporate junction?

For these reasons, the judgment below must be reversed and a new trial awarded.

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ALBERT MCINTOSH, FOR THE USE OF BOWEN, &c., v.
HORACE S. JOHNSON.

AT LAW.—No. 19,597.

A justice of the Supreme Court of the District of Columbia cannot legally authorize a writ of *certiorari* on a judgment rendered by a justice of the peace upon the verdict of a jury in a civil suit before him.

STATEMENT OF THE CASE.

This was a civil suit commenced before a justice of the peace in May, 1878. On the day to which the case was continued the parties appeared and the plaintiff demanded a jury trial; and after hearing the evidence on both sides the jury returned a verdict in favor of the plaintiff for \$90.95, with costs. In his petition for a writ of *certiorari* the defendant sets up that he has a defense to the action upon the merits, and that he presented such defense, but the jury did not consider the same. Upon this petition a writ of *certiorari* was issued in the usual form by one of the justices of this court. In obedience to this writ the magistrate made his return showing the trial before him, the demand for a jury, the verdict for the plaintiff, and other proceedings.

On May 29, 1878, a motion was made in the court below to quash the writ, which was overruled, and the case is here upon the plaintiff's appeal from that order.

Ray & Newman, for plaintiff.

By the COURT:

The question presented by this record is whether a justice of the Supreme Court of the District can legally issue a writ of *certiorari*, after a judgment by a justice of the peace upon the verdict of a jury in a civil suit before him.

This question was decided in the negative by this court in the case of *Fitzgerald v. Leisman*, ante, 6.

There the writ had been issued, and on the return thereof

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a motion was made, as was done in the case to quash the writ, which motion was sustained by this court in general term, citing the seventh amendment to the Constitution of the United States, which declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

In that case an appeal had been refused by the justice of the peace; in the present case no appeal was asked, and the object of the writ was undoubtedly to procure a retrial of the case in this court.

This is not permissible, and the reasons are so fully stated in the case referred to that it is unnecessary to repeat them. The order appealed from must be reversed and the writ quashed.

JOSEPH MCINTOSH ET UX v. CHARLES H. MOULTON,
THOMAS H. CALLAN, SAMUEL CEAS, AND PATRICK
CORCORAN.

EQUITY.—No. 5,259.

- I. Parties defendants who have filed answers to a bill in equity are not entitled to have the bill dismissed for want of prosecution, unless they have given ten days' notice, as prescribed by rule 61, to complainants' solicitor of the filing of such answer.
- II. If defendant neglect to give such notice, either party may set the cause down for hearing upon bill and answer without notice.

STATEMENT OF THE CASE.

This is a bill in equity filed November 21, 1876, and the answers of defendants Ceas and Corcoran were filed February 6, 1877; and on February 20, 1878, no replication having been filed to said answers, the said defendants obtained an order *ex parte*, or, rather, as of course, dismissing the bill for want of prosecution. June 1, 1878, the complainant, by his solicitor, made a motion to vacate said order, which mo-

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tion was supported by an affidavit of said solicitor that he had no notice that said answers had been filed, or that said cause had been dismissed, until within the ten days then last past. An order was thereupon passed vacating the decree of February 20, 1878, dismissing the bill and reinstating the cause. From this order the defendants Ceas and Corcoran have brought this appeal.

Rule 61 prescribes that "whenever the answer of the defendant shall not be excepted to, the plaintiff shall file the general replications thereto within ten days after notice of the filing of such answers," &c. And the sixty-second rule provides: "If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order as of course for a dismissal of the suit," &c.

J. Parker Jordan, for complainants.

L. G. Hine, for defendants.

The question is, had the court below jurisdiction to nullify said decree three months and seven days—two full terms—after its enrollment?

Equity rule 61 does not aid the plaintiff, because it prescribes the time for appearance and answer. The plaintiff having invited defendants into court, must be presumed to have had notice that answers were filed within the time prescribed.

The rule does not, it will be observed, require that a copy of defendants' answer, or even notice of its having been filed, shall be served on the plaintiff or his solicitor, and such has not been the practice of this court since its organization. (*Bank U. S. v. Mosset et al.*, 6 How., 591; *Rower v. Smith*, 1 Otto, 149; Equity Rule 88.)

By the COURT:

We decide in this case that the defendants were not entitled to have the plaintiffs' bill dismissed for want of prosecution, unless they had given ten days' notice to the plaintiffs'

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solicitor of the filing of their answer. That notice may be given either at the time of filing the answer or at any time subsequently. The ten days are to be counted from the time of service of notice upon the plaintiff's solicitor. If the defendant has neglected to give the notice after having filed his answer, and the plaintiff chooses to set the cause down upon the bill and answer for hearing, he can do so, and the same privilege belongs to the defendant, and that without notice. The setting the cause down for hearing is notice itself.

The order appealed from must be affirmed.

WILLIAM W. RODERICK v. DISTRICT OF COLUMBIA.

AT LAW.—No. 19,338.

- I. The Metropolitan Police Force is a part of the municipal corporation of the District of Columbia.
- II. The Commissioners of said District had authority under the act of Congress of March 3, 1875, to deduct ten dollars per month, which had been allowed by the late corporation of Washington and the Legislative Assembly, from every salary of the members of said force.

STATEMENT OF THE CASE.

The cause was heard at the general term in the first instance upon the following stipulation of facts:

"It is hereby stipulated and agreed between counsel, as well for the plaintiff as the defendant in the above cause, that the following is a true statement of all the facts material to the issue in the above cause, and necessary to be brought to the attention of the court for the decision of the same:

"1st. That the plaintiff, William W. Roderick, from the 1st day of March, A. D. 1875, until the 26th day of December, A. D. 1877, was a regularly enrolled private of the Metropolitan Police of the District of Columbia, and performed his

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duty as such, and was during said period entitled to all the pay legally payable to privates of said police force.

“2d. That on the 9th day of March, 1875, the Commissioners of the District of Columbia promulgated the following order:

“‘Whereas, by section 366 of the Revised Statutes of the District of Columbia, it is provided that the salaries of the officers, privates, and detectives of the police force shall be as follows: Major, \$1,740 per annum; captains, \$1,200 per annum; lieutenants, \$840 per annum; sergeants, \$65 per month; privates, \$60 per month; detectives, \$90 per month; and by section 367 it is provided that “the Metropolitan Police Force, its officers and clerks, shall receive a further compensation of 50 per centum upon their respective salaries, as provided for in this chapter, which further sum shall be paid by the cities of Washington and Georgetown and the district beyond the limits of said cities, in the proportion corresponding to number of privates allotted severally to said precincts”:

“‘And whereas an ordinance of the late corporation of Washington approved April 25, 1871, provides that from and after that date the compensation of each and every member of the Metropolitan Police Department paid by said corporation should be increased \$10 per month; and by an act of the Legislative Assembly approved August 18, 1871, it was provided that the same salaries then paid by the corporation of Washington per month to members of the Metropolitan Police Force should, after July 1, 1871, be paid to the members of said force doing duty in any part of the District of Columbia:

“‘And whereas, by said ordinance of said corporation of Washington and said act of the Legislative Assembly, the salaries of the members of said police force have been increased in the sum of \$10 per month above the amount fixed by act of Congress:

“‘And whereas, under an act of Congress approved March 3, 1875, entitled “An act for the support of the government of the District of Columbia for the fiscal year ending June

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30, 1876, and for other purposes," the Commissioners of said District are authorized to "reduce, adjust, and equalize the pay or salaries of all officers or employees, payable from the funds of the District government in whole or in part":

"Now, therefore, in pursuance of said authority, and in order that the salaries of the members of said police force may conform to the enactments of Congress, it is—

"*Ordered*, That from and after the 1st day of April, 1875, the sum of \$10 allowed by said ordinance and act of Assembly shall be deducted from each and every salary to which it has heretofore been added.

"The aggregate salaries payable to the members of said police force from the United States and from the District, and mentioned in the Revised Statutes, will then, conformably to said law, be as follows: Major, \$2,610 per annum; captains, \$1,800 per annum; lieutenants, \$1,260 per annum; sergeants, \$102.50 per month; privates, \$90 per month; detectives, \$135 per month.'

"3d. That for each and every month prior to the promulgation of said order above recited there had been paid to the said Roderick, under the provisions of the said ordinance of the corporation of Washington approved April 25, 1871, and under the provisions of the said act of the said Legislative Assembly approved August 18, 1871, the sum of \$10 in said ordinance and act provided for; but after the passage of said order the said sum was not at any time paid or for any month.

"4th. That said Roderick, together with many others of the said Metropolitan Police Force, made written protest against said order to said Commissioners on, to wit, the — day of May, A. D. 1875."

Birney & Birney and L. G. Hine, for plaintiff.

We submit that the order of March 9, 1876, was not in pursuance of the power granted in the act of March 3, 1875, for the support of the District government, and that it was an unwarranted application to a class of Federal officials, whose salaries were fixed by Congress, of a law intended to

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apply exclusively to municipal officers of the local government of the District of Columbia.

A. G. Riddle, for defendant.

1st. The Metropolitan Police Force are "officers and employees," paid in *part* by the funds of the District, and hence within the purview of the act of March 3, 1875. (Rev. Stats. Dist. of Col., secs. 366, 367.)

2d. The reduction made by the order of March 9, 1875, was clearly within the words and meaning of said act. As bearing on this point, and so that the court may have all the legislation on the subject-matter before it, I quote the following from the sundry civil appropriation act of June 20, 1878: "And the Commissioners are hereby authorized to fix the salaries to be paid to the officers and privates of the Metropolitan Police Force, until otherwise provided by law." Congress must be presumed to have had knowledge of the action of the Commissioners in the premises at the time of the passage of this last act, and as it does not change, it must be taken to approve of it. It merely enlarges the powers of the Commissioners in reference to that single branch of the service, but in no way disapproves of their former action with reference to it.

Mr. Justice MACARTHUR delivered the opinion of the court:

The plaintiff is a member of the Metropolitan Police Force for the District of Columbia. It appears that the old corporation of the city of Washington, in the month of April, 1871, passed an ordinance providing that from that date the compensation of each and every member of the Metropolitan Police Department should be increased at the rate of \$10 per month. The Legislative Assembly, in the following August, extended this additional compensation to the members of the police force doing duty in any part of the District.

It further appears that on the 3d of March, 1875, Congress passed an act for the support of the District government, the fourteenth section of which is as follows:

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“That the Commissioners of the District, and their successors in office, are hereby authorized to *reduce, adjust, and equalize* the pay or salaries of all officers or employees *payable from the funds of the District government in whole or in part*: *Provided, however, That the aggregate sum of pay and salaries shall not be increased beyond the present aggregate amount of pay and salaries.*” (18 Stats., 505.)

Under this section the Commissioners claimed the power to disallow the payment of the \$10 from the funds of the District, and they therefore made the order of March 9, 1875, to take effect on the 1st of April following, deducting the same from each and every salary to which it had been added. In other words, they reduced the pay of the members of the Metropolitan Police force to the sum established by the act of Congress, and the plaintiff brings this action to recover this \$10 per month from that time until the institution of the suit. It is contended that the act of Congress of March 3, 1875, authorizing the Commissioners to reduce salaries, applies only to the officers and salaries which have been created by the District government, and was never intended to give them any right to interfere with the compensation of persons employed in the police force; that they were not employees and officers of the District, but constituted a Federal force established by acts of Congress, governed by a board appointed by the President, and having their salaries fixed by congressional enactment.

It will be seen that the language of the act is quite comprehensive; for it is to reduce, adjust, and equalize the pay or salaries of all officers or employees payable from the funds of the District government in whole or in part. It is admitted that the expenses of this force, including the pay and salaries of its members, are defrayed in part from the funds of the District, and large sums are raised every year by local taxation for that purpose. It will be seen by reference to section 366 of the Revised Statutes of the District of Columbia what these salaries are as designated by Congress; and by section 367 it is further provided, that “the Metro-

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politan Police Force, its officers and clerks, shall receive a further compensation of 50 per centum upon their respective salaries, as provided for in this chapter, which further sum shall be paid by the cities of Washington and Georgetown and the district beyond the limits of said cities, in the proportion corresponding to the number of privates allotted severally to said precincts." And the acts of July 31, 1876, and March 6, 1877, appropriate for salaries and other necessary expenses of the Metropolitan Police \$150,000, provided that a like sum shall concurrently be paid out of the treasury of the District of Columbia for the same purpose. The District being chargeable in part with the payment of these salaries, by a reasonable interpretation of the act of March 3, 1875, the Commissioners were fairly authorized to make the order reducing the salary of the plaintiff, in common with that of the other members of the force.

The learned counsel for the plaintiffs denies that the Metropolitan Police are among the "officers or employees" referred to in the statute, and claims that they are a Federal institution, and beyond the control of the District authorities. We are not disposed to ignore the facts upon which this argument is supported. We recognize that the Metropolitan force was established by an act of Congress in 1861, and that from that time to this it has been maintained by United States laws and appropriations, which partly defrayed its expenses. No doubt Congress intended that the force it created should be largely under its control. It was instituted at a time when the government was in very great peril, and required a body of men at the capital upon whose fidelity it could depend for protection. This consideration ought not to divest it of a municipal character. Its duty consisted principally in preserving peace and order in the District; it was the only police force in the District. We know that all city governments possess the power to secure public safety and good order, and to establish and maintain a police force to that end. This is universally recognized as a municipal function, and undoubtedly entered into the municipal government of the

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District. In *Barnes v. The District of Columbia*, 1 MacA., 322, this court decided that the late Board of Public Works was a body independent of the municipal government of the District, and that the District was not liable in an action at law for an injury occasioned by the negligence of said board. The Supreme Court of the United States reversed this decision, and held that the board was a part of the municipal corporation, and that the District was liable for their negligence. (1 Otto, 540.) Now, the act prescribing the powers of the Board of Public Works, in respect of the authority committed to it, was similar in principle to the Board of Health, the Fire Department, and the Board of Police. They were all created by Congress, and the members of the different bodies were appointed by the President and paid by the United States. But under the above decision they are undoubtedly to be considered as parts of the same municipal corporation for the government of the District of Columbia. Perhaps it would be difficult to define our municipal condition; it is *sui generis*. Congress has the power of exclusive legislation over the District, and our statute law is now created by Federal legislation. It is, perhaps, not inapt to say that we bear the same relation to the general government that a city does to a State government in one of the States; that all the officers for conducting our local affairs, whether appointed by the President, or created by Congress, or employed by the Commissioners, are municipal officers. They are like servants having two masters, federal and municipal. This appears to be the doctrine of the Supreme Court in the case of *Barnes v. The District*, where they remark: "A municipal corporation may act through its mayor, through its common council, or its legislative department by whatever name called; its superintendent of streets, commissioner of highways, or board of public works, provided the act is within the province committed to its charge. Nor can it in principle be of the slightest consequence by what means these officers are placed in this position; whether they are elected by the people of the municipality or appointed by the Presi-

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dent or a governor. The people are the recognized source of all authority, State and municipal; and to this authority it must come at last, whether immediately or by a circuitous process." Although our condition is anomalous, and although we are without what is usually understood to be a corporation charter of a city, we are still in the category of a municipality, which can sue and be sued, and which is liable for the negligence of its officers, however appointed, and which is also liable on all their contracts officially entered into in conformity with the provisions of law.

It is, therefore, not disposing of the question before the court at all to argue, as was most ingeniously argued here, that because the Metropolitan Police Force was a Federal force, it was not subject to any general law of the description we are now considering. Besides, if it be true that the Metropolitan Police is a purely Federal force, and it has nothing about it pertaining to the municipality of the District of Columbia, what authority was there in the corporation of Washington, or in the Legislative Assembly of the District, to add ten dollars a month from the funds of the District to their compensation?

The former governments which existed here would have no more right to confer upon them a gratuity of this kind than upon a clerk of this court, or upon the Cabinet officers of the United States, simply because they performed their duties in Washington. The argument goes too far. Besides, the additional ten dollars was clearly a municipal act, if it had any validity at all; it was a mere bounty, and we cannot perceive why the law in question did not authorize the Commissioners to discontinue it. They reduced the salary to the sum established by Congress, leaving it precisely where Congress had left it, without any reduction from that amount. We are clearly of opinion that the argument we are now considering is entirely overcome by the suggestions already made.

We have seen that the expense of the Metropolitan Police is to be defrayed by the mutual appropriations by Congress,

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and from the funds of the District. The statute is plain upon its face. Its express language is, "all officers or employees payable from the funds of the District government in whole or in part." The duty of these officers is confined locally to the District of Columbia, and are purely municipal in their nature. They are paid out of the treasuries of the District of Columbia and of the United States, and are, therefore, literally within the meaning of the law. We can reach no other conclusion than that, upon the admitted facts in the case, the plaintiff has no right of action, and there must be judgment in favor of defendant.

The court can only add that they are sensible of the meritorious service which is rendered to our citizens by the police force, but whether they are sufficiently compensated is not our duty to determine. It is simply our duty to pass upon the true meaning of a statute.

JOHN T. VINSON, ADMINISTRATOR OF RACHEL PROUT,
v. MICHAEL W. BEVERIDGE.

AT LAW.—No. 358.

- I. A and B were partners. They agreed with C, who was their salesman, to associate his name with the firm. C was to receive for his services at the rate of four per cent. on the amount of cash and credit sales, but was not to be bound for the debts of the firm. A notice was published in a newspaper of large circulation that C was to have an interest in the establishment. It was held that this was not a declaration of copartnership, and did not make C responsible for the debts of the firm.
- II. Such publication will not entitle a creditor of the firm to recover against C, unless he knew of it previously to giving credit; and the mere proof of publication in a newspaper is not sufficient to show that the creditor had such knowledge at the time of the transaction.

STATEMENT OF THE CASE.

This is an action to recover the amount of a promissory note made by C. S. Fowler & Co., in favor of Rachel Prout,

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for the sum of \$1,600, with interest from date, dated August 1, 1860, and payable on demand. It was admitted at the trial that the note was the note of the firm of Charles S. Fowler & Co., and was wholly in the handwriting of Charles S. Fowler himself. For the purpose of showing that the defendant was a member of the firm of C. S. Fowler & Co., the plaintiff gave in evidence an advertisement or public notice, published in "The National Intelligencer" about the 1st of April, 1858, in these words: "Notice!—M. Wm. Beveridge has interest in our establishment from the 1st instant. We trust, with his additional aid, &c., we shall be able to offer further inducements in our business. C. S. Fowler & Co." He also called the defendant as his witness to prove that at the time when said notice was published the defendant was in the store of C. S. Fowler & Co., and knew of its publication. On cross-examination defendant testified that before the publication referred to he was employed by the firm, then consisting of Charles S. Fowler and John F. Webb, as a salesman, at a fixed salary; and about that time entered into the following agreement:

"We, the undersigned, do hereby agree to associate with us the name of M. Wm. Beveridge, for the space of one year, for the purpose of conducting the crockery business in its various branches, under the name and style of C. S. Fowler & Co.; the said M. Wm. Beveridge to receive for his services the rate of four per cent. on the gross amount of cash and credit sales; but in no case shall the said M. Wm. Beveridge be considered bound for any debt or debts of the above-named firm."

And, further, that he had no more control in the business of said firm after than before said agreement; that he never signed the firm-name, purchased goods, nor contracted debts in its name; and was not acquainted, in any way, with its business or books except so far as was necessary in the discharge of his duty as salesman.

At the conclusion of the testimony the defendant asked the court to instruct the jury as follows:

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First. That the publication offered in evidence was not a declaration of partnership, and had not the effect to make defendant responsible, as a partner, for the debts of the firm of C. S. Fowler & Co., notwithstanding that it was authorized by him.

Second. That in the absence of actual proof of partnership, the plaintiff cannot recover from defendant in this action without proving that he, the defendant, held himself out to plaintiff's intestate as such partner, and that she gave the credit to said firm, out of which the note in suit grew, believing defendant to be a member thereof; that it is not sufficient to show that defendant held himself out to the world generally as a partner; but it must be proved that he so held himself out to the plaintiff's intestate, and that the publication was not such holding himself out to her, nor sufficient to make him liable as a partner in this action, unless the jury found that it came to her knowledge before the credit was given.

Third. That the publication is merely a circumstance which may be considered as tending to prove actual knowledge by plaintiff's intestate that defendant held himself out as a partner, but does not raise a presumption of such knowledge, to be rebutted by the defendant; and unless the jury are satisfied that such knowledge existed the defendant is not liable.

The cause is now here on a motion for a new trial in the first instance, upon exceptions to the refusal of the court to instruct the jury as requested.

A. G. Riddle and *Francis Miller*, for plaintiff, cited Story on Partnership, sec. 64; 3 Kent's Comm., 32 and 33; Chitty on Contracts, 263; *ex-parte* Hamper, 17 Vesey, 414, note; *Fisher v. Bowles*, 20 Ill., 396; *National Bank v. Norton*, 1 Hill, 578 and note; *Johnston v. Warden*, 3 Watts, 106; *Wright v. Pulham*, 2 Chitty's Rep., 121; *Post v. Kimberly*, 9 John., 489; *Pitcher v. Barrows*, 17 Pick., 365; *Benedict v. Adm'rs of Davis*, 2 McL., 350; Chitty on Bills, p. 39.

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W. S. Cox and W. B. Webb, for defendant, cited Parson on Contracts, vol. 1, (6th edition,) p. 161; Story on Partnership, sec. 32, and cases cited in note 1; 3 Kent's Comm., 33, 34; *Burkle v. Eckhart*, 1 Denio, 342; same case on appeal, 3 Comstock, 137, 138; *Denny v. Cabot*, 6 Met., 89; *Berthold et al. v. Goldsmith*, 24 How., 543; *Pond v. Pittard*, 3 Met. & Wels., 357; *Vanderburgh v. Hall*, 20 Wend., 70; 1 Smith's Leading Cases, 731; *Dickinson v. Valpy*, 10 B. & C., 128, 140; *Wood v. Duke of Argyle*, 6 M. & G., 928, 932; *Wood v. Pennell*, 51 Me., 52; *Fitch v. Harrington*, 15 Gray, 468; *Shott v. Streetfield*, 1 Moody & R., 8; *Carter v. Whalley*, 1 B. & Ad., 11; *Benedict v. Davis*, 2 McLean, 347; *Markham v. Jones*, 7 B. Mon., 456; *Hicks v. Craw*, 17 Vt., 449.

Mr. Justice HAGNER delivered the opinion of the court:

The defendant's *first* prayer presents to the court the question whether the advertisement, *in itself*, was a declaration which was sufficient to bind the defendant as a partner, as to any person who may have dealt with the firm after seeing the advertisement. In our opinion it was legally entitled to no such effect.

It merely stated that "from the 1st instant" Beveridge had "an interest in the establishment," which, in itself, furnishes no proof that he was to be a *member of the firm*; since a participation in profits, if the language necessarily implied even that, does not, in itself, constitute the recipient a partner.

In Pollock's Digest of the Law of Partnership, page 2, it is declared that the nearest approach to a precise definition which has been given by judicial authority in England, is the statement that "to constitute a partnership the parties must have agreed to carry on business and share the profits in common, where '*profits*' means the excess of returns over outlays." So far from conveying any such idea, the language of the advertisement would seem to repel it. It simply gives notice that from the date specified Beveridge "has an interest," and it contains the further expressions, "our establishment," "our business," "we trust," "we shall," "his addi-

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tional aid"; and it is not signed by Beveridge or by the individual members, but with the old firm-name. For these reasons, we think the first prayer of the defendant should have been granted.

In our opinion the second prayer of the defendant correctly embodied the law upon the point involved. Where the party sued in reality was not a partner, he cannot be held answerable to a creditor of the firm, unless it is proved in some satisfactory manner that the plaintiff, at the time the credit was given to the firm, had been induced to believe that the defendant was in fact a partner, by some act or declaration on his part which had come to the plaintiff's knowledge, and upon the faith of which he gave the credit. This is succinctly stated in note 3 to section 65 of Story on Partnership. See, also, Pollock, p. 23. A person who is not really a partner may by act or declaration untruly, and without authority, represent himself as such to others, and thereby, under some circumstances, expose himself to liability as a member of the firm. (Pollock, 22.) Such act or declaration is known as "holding out" oneself as a partner; and upon the plain principle of honesty, such conduct estops a defendant from afterwards disclaiming the character he has thus voluntarily assumed. But such conduct will not entitle the plaintiff to recover against such a defendant unless it had previously "been known to the person who seeks to make him liable; otherwise there is no duty towards that person." (Pollock, pp. 23-4; 1 Taylor on Evidence, sec. 773.) Whatever force, therefore, the advertisement might be supposed to have, if it had previously come to the notice of the plaintiff's intestate, the prayer properly stated that it could have no such effect unless he had been so apprised of it.

The *third* prayer raises the question as to the *legal value* of the proof, that the advertisement "had been published in 'The National Intelligencer,' a newspaper published in the city of Washington, and having a large circulation in Washington and its vicinity, three times"; for there is no other evidence whatever upon the point presented to this court by

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the exception. There is, therefore, *nothing* before us to show that the plaintiff's intestate lived "in Washington or its vicinity," or that she took the paper, or had the opportunity of seeing the notice; and in the absence of such proof, the mere fact of the publication, in our opinion, was entirely insufficient, in the words of the authorities, "*to lead the jury to conclude*" that she had any knowledge that it had been published at the time of this transaction. The very point has been settled by the authorities here and in England. (2 Taylor, sec. 1479; *Boyd v. McCann*, 10 Md., 118.)

The bare fact of publication, then, being insufficient to enable the jury to conclude that the notice had come to the knowledge of the plaintiff's intestate, the defendant had a right to ask that the jury should be instructed that there was a total failure of evidence upon the point. The instruction, as asked, was less favorable to the defendant than he was entitled to claim.

This position is fully sustained by the authorities, and we adopt as our own the language of the Court of Appeals of Maryland. (*Clarke v. Dederich*, 31 Md., 148.) "The legal sufficiency of the evidence adduced to sustain the issue, or to establish any particular fact material to its determination, is a question of law and not of fact; and whenever it is so light and conclusive that no rational, well-constructed mind can infer from it the fact which it is offered to establish, it is the duty of the court, when applied to for that purpose, to instruct the jury that there is no evidence before them to warrant their finding the fact thus attempted to be proven."

We therefore reverse the rulings excepted to, and remand the case for a new trial.

INDEX.

ACTION.

See PLEADING, 1.

COURT OF CLAIMS, 1, 2, 3, 4.

1. It is no cause of action against the commissioners of the Freedman's Savings and Trust Company, that a depositor gave sixty days' notice, according to the rules of the company, that he intended to check or draw out the amount of his deposit, and that the sixty days expired before the suspension took place, or the commissioners took possession of the assets. *Schoyer v. Commissioners Savings Bank*, 5.
2. A member of the fire department of the city of Washington cannot maintain a personal action for his monthly salary unless he has actively performed the duties of his office; and the fact that he has been removed without notice of charges and a trial, will not entitle him to this remedy. *Meredith v. District of Columbia*, 52.
3. In an action for money had and received to the plaintiff's use, the plaintiff cannot recover the money unless he proves that it is against conscience for the defendant to keep it. The burden of showing this is upon the plaintiff. In the absence of proof upon this point, the presumption is that the money was lawfully paid to the defendant, and that he has the right to retain it. *United States v. Lamon*, 204.
4. The defendant was appointed by a decree of the Circuit Court of Alexandria, Virginia, receiver of a railroad in that State. The plaintiff was injured while a passenger on such road, and brings this action against the receiver for damages; and it was held that the action would not be maintained in this jurisdiction without leave of the court which appointed defendant such receiver. *Barton v. Barbour*, 212.
5. The Baltimore and Potomac Railroad was authorized by act of Congress May 21, 1872, to lay its track along Sixth street, paying any damage sustained by the owners of property. If the company could not agree with the owner, it was required to cause the damages to be assessed by a jury. This the company neglected to do, and the court decides that the owner can maintain an action on the case for such neglect of the company, and that the plaintiff can recover in such action all the damages resulting to his property. *Dickson v. Baltimore and Potomac Railroad Company*, 362.
6. If a creditor take a conveyance of real estate containing covenants of warranty in payment of his indebtedness, and should the title to

- the land turn out to be defective, his only remedy is upon the covenants in the deed. *Van Riswick v. Wallach*, 388.
7. Where the Board of Public Works of the District of Columbia, in pursuance of an act of the Legislative Assembly, appropriated private property for a public street, and procured the same to be condemned, and a jury to assess the owner's damage, and also paved and curbed the same and dedicated it to public travel, the District is estopped from denying its power in the premises, and the owner will be entitled to the damages awarded by the jury. The owner's consent to the appropriation of his property is to be inferred from his bringing an action to recover the damages. *Cahill v. District of Columbia*, 419.

ADVERSE POSSESSION.

1. A deed of conveyance from the devisee of a trustee in a trust deed will give color of title to the possession accompanying it, and a claim of title and possession under it will be evidence of an interest in the land described in the deed adverse to every other claim. *Harmon v. Dyer*, 292.
2. A judgment in ejectment which was perpetually enjoined by a decree in equity for the reason that it was obtained fraudulently, does not interrupt the continuity of an adverse possession. *Ib.*
3. Where there have been two actions in ejectment, one of which has been perpetually enjoined and the other discontinued, and where the defendants set up their title again in a cross-bill, a court of equity will entertain jurisdiction to quiet the title where the adverse possession has ripened into a full and perfect estate. *Ib.*

APPEAL.

See ATTACHMENT, 1.

BILL OF REVIEW, 2.

1. An appeal will not lie from a judgment in a Justice's Court founded upon a verdict of a jury. *Fitzgerald v. Leisman*, 6.
2. An order overruling or sustaining a demurrer, with leave to amend or answer over, is not appealable. *Parsons v. Parker*, 9.
3. An order sustaining a demurrer to a bill of complaint in equity, or to a declaration at law, does not involve the merits of the case where leave is given to amend such bill or declaration within a specified time. If the plaintiff elects not to amend, and there is judgment against him, he may then appeal to the general term. *Ib.*
4. After final judgment, if an appeal be taken, all orders made in the progress of the suit affecting the merits are subject to review by this court. *Ib.*
5. On the argument of an appeal from an order of the special term quashing a writ of certiorari, it is irregular to read an *ex-parte* affidavit of the magistrate before whom the case was tried. If the re-

turn is defective, there must be a motion for a further or amended return to the writ. *Market Co. v. Summy*, 59.

6. This court will compel a justice of the peace, by mandamus, to issue a writ of restitution in execution of a judgment which he has rendered in a landlord and tenant proceeding, where no undertaking has been given by the defendant within the time prescribed by the rules of court in case of appeal. *Kirk v. Cole*, 71.
7. An appeal from a judgment rendered by a justice of the peace will be dismissed where no undertaking was given, as required by rules of court, within ten days after the rendition of the judgment; and the magistrate has no discretion which will authorize him to allow an appeal after the expiration of the prescribed period to which he must conform his practice in all cases of appeal. *Ib.*
8. An appeal does not lie from an order awarding a writ of assistance, or from an order refusing to grant it. *Bryan v. Sanderson*, 402.
9. The undertaking prescribed by general rule 91, need not be filed by the party appealing, unless the appeal is to operate as a stay of proceeding. *Bryan v. Sanderson*, 404.

ASSAULT AND BATTERY.

1. In an action for an assault and battery, the acts of both parties at the time of the transaction constitute the *res gestæ*; and if these acts, on the one hand, are such as aggravate the character of the offense, they should increase the damages. If, on the other hand, they are such as show provocation on the part of the plaintiff, they mitigate the character of the act, diminish the damages in a corresponding degree, and the acts and declarations of the plaintiff at the time are to be considered for this purpose. *Huber v. Teuber*, 484.
2. It is erroneous to instruct the jury, that if they find the defendant acted maliciously they must give more than compensatory damages. The matter of exemplary damages is to be left wholly to the discretion of the jury. There are properly only two classes of damages in actions *ex delicto*—compensatory and those called exemplary; and compensatory damages include remuneration for injured feelings, pain, and mental suffering. *Ib.*
3. Exemplary damages cannot be recovered in a civil action for an assault and battery, when that is an offense punishable by a criminal prosecution. In such action the damage should be compensatory only. *Id.*

ATTACHMENT.

See GARNISHEE PROCESS, 2.

1. An order quashing an attachment is appealable to the general term. *United States v. Ottman*, 73.
2. The United States, when plaintiff in a civil action, is entitled to the writ of attachment, and is relieved by section 1001 of the Revised Statutes from giving the usual undertaking in such cases. *Ib.*

ATTORNEY AT LAW.

See COURT OF CLAIMS.

1. The court will recognize written stipulations entered into by attorneys in regard to the conduct of a cause, and will interfere to prevent their violation by either of the parties; and a continuance should be allowed until the next term when an agreement to that effect has been entered into by the attorneys in the cause. *Strong v. District of Columbia*, 499.
2. The competency of attorneys to enter into stipulations with one another considered, and the ultimate authority of the court in such matters recognized. *Ib.*

BANK CHECK.

See POWER OF ATTORNEY, 1, 2.

BANKRUPT LAW.

A corporation engaged in the business of printing and publishing a weekly newspaper, is not a manufacturer within the meaning of the bankrupt law, and a petition against an alleged bankrupt as a manufacturer, on the ground that the bankrupt has failed to pay his promissory notes, is defective if it does not allege that said notes were made and passed in his alleged business of a manufacturer. *In re Capital Publishing Co.*, 405.

BILL OF REVIEW.

1. It is now settled in our practice that the pleadings, orders, and proceedings in a cause, as well as the final decree, constitute that portion of the record for the purpose of examining all errors of law in a bill of review. *Davis v. Speiden*, 283.
2. An order overruling a demurrer to a bill of complaint, and giving leave to the defendant to answer, is not appealable to the general term; but if, in such case, there is an appeal bond approved by one of the justices, it will operate as a stay of proceedings at the special term; and if any decree affecting the rights of the parties is taken at such special term during the appeal, it will be error in a bill of review. *Ib.*
3. Unless the averments in a bill of complaint are precise and definite, no decree can be taken without proof, although a decree *pro confesso* has been previously obtained; and such error may be assigned in a bill of review. *Ib.*
4. A party must, in general, perform a decree before filing a bill of review. Where the decree is for the payment of money, he must either aver performance or set up his inability arising from insolvency. *Ib.*

BOARD OF PUBLIC WORKS.

See CONTRACT, 1.

PLEADING, 2.

1. The Board of Public Works had no authority to enter into a contract for paving a sidewalk on one of the streets around the Capitol, which was provided for in sundry civil appropriation act of March 3, 1873, 17 Stats. at Large. *Railroad v. District of Columbia*, 11.
2. Where the Board of Public Works of the District of Columbia, in pursuance of an act of the Legislative Assembly, appropriated private property for a public street, and procured the same to be condemned, and a jury to assess the owner's damage, and also paved and curbed the same and dedicated it to public travel, the District is estopped from denying its power in the premises, and the owner will be entitled to the damages awarded by the jury. The owner's consent to the appropriation of his property is to be inferred from his bringing an action to recover the damages. *Cahill v. District of Columbia*, 419.

CERTIORARI.

See APPEAL, 1, 5.

CRIMINAL LAW, 11.

1. A motion to quash a writ of certiorari is not a non-enumerated motion within the meaning of section 800 of the Revised Statutes of the District of Columbia, and it may be heard by any of the justices of the court at chambers. Rule 19 is not in violation of that statute. *Maxwell v. Creswell*, 374.
2. This court will quash a writ of certiorari issued to remove proceedings before a magistrate under the landlord and tenant act, where it appears that the justice is not exceeding his jurisdiction. Nor will it be sufficient to sustain such writ that the tenant alleges that he has made improvements upon the demised premises, by reason of which there has been no default in payment of rent. *Insurance Co. v. Tallmadge*, 422.
3. A justice of the Supreme Court of the District of Columbia cannot legally authorize a writ of certiorari on a judgment rendered by a justice of the peace upon the verdict of a jury in a civil suit before him. *McIntosh v. Johnson*, 586.

CHATTEL TRUSTS.

When chattel trust deeds have been executed by a tenant upon his furniture after the same has been placed upon the leased premises, and a judgment creditor's bill is filed against the tenant, to which the landlord is made a party defendant, and in his answer to such bill the landlord asserts his lien for rent in arrear, and prays judgment of the same out of the funds to be realized from the sale of such furniture, it was decided that such landlord had precedence over the deed of trust, notwithstanding that he had taken no steps prescribed

by the statute for enforcing his tacit lien, and the tacit lien of the landlord exists independently of the methods prescribed by the statute for enforcing it; and if the property subject to such lien come into the possession of a court of equity, or of its officers, it comes into such possession subject to the lien created by the statute in favor of the landlord. *Bryan v. Sanderson*, 431.

COLLATERAL.

See PROMISSORY NOTES, 2, 3.

CONFISCATION ACTS.

A deed of conveyance executed by a grantor whose estate has been judicially confiscated under the act of July 17, 1862, (12 Stat., 589.) is of no effect, and conveys no interest or title; and on the death of such grantor the lands go to his heirs at law, subject to his debts created previously to the act under which the estate was confiscated, provided that the personal assets are insufficient. *Wallach v. Van Riewick*, 168.

CONTRACT.

See PLEADING, 2.

1. The plaintiff made a proposal to the Board of Public Works to put down certain pavements, the board to designate the streets when the plaintiffs should be ready to commence. The assistant secretary of the board embodied the proposal in a letter accepting it, signed by his name alone: *Held*, That this was not a contract executed as prescribed by law, and was not binding on the District in an action to recover damage for a failure of the board to designate such streets. *Ballard v. District of Columbia*, 49.
2. In an action upon a parol contract against executors, the plaintiff cannot be examined as a witness on his own behalf to prove such contract, or to testify to conversations with the deceased, unless called by the opposite party or by the court to be examined. (U. S. Rev. Stats., sec. 858.) *Meguire v. Corwine*, 81.
3. A contract to pay plaintiff one-half of all fees in prize and bounty cases, in consideration of his assistance in securing the other contracting party to be appointed by the government special counsel therein, and also in consideration of plaintiff's assistance in arranging and carrying on such defenses, is illegal and void as against public policy. *Ib.*
4. Payment of part of a debt is not a satisfaction of the whole; and a receipt in full is no bar to a recovery of the balance, if the party giving it has been misled or deceived. But if the parties come together voluntarily, after the services have been rendered, and a dispute exists as to amounts due, and the plaintiff accepts and receives the sum of \$4,000 in full satisfaction and discharge of all claims in pursuance of a settlement, and executes a receipt accordingly, he cannot afterwards maintain an action for a larger amount. *Ib.*

5. The publisher of a newspaper contracted with the Commissioners of the District of Columbia to publish the tax list for said District; but before either party was called upon to perform the same, Congress changed the law under which such contract was made. There was no special agreement under the new act, and it was held that he could only recover what the work was fairly and reasonably worth. *Murtagh v. District of Columbia*, 455.
6. When the law requires the tax list to be published in a daily newspaper, evidence is not admissible to prove the cost of publication, composition, and distribution in a job printing office, or to prove the mere offer of the proprietor of another newspaper to publish the tax list of a subsequent year. *Ib.*
7. An agent or servant who is employed at a fixed salary cannot be interested in the profits made out of articles which he sells to his employers; yet if such employers knew of his interest when they made the purchase, the vendors for whom he acted cannot escape from their contract to remunerate him. *Wright v. Welch*, 479.

CONTRACTORS.

See RAILROAD COMPANIES, 1 to 6.

CONSTABLE.

1. A levy and seizure by a constable of the property of persons not defendants in the execution, is a breach of the condition of his official bond for which the sureties are liable. *United States v. Hine*, 27.
2. An unsatisfied judgment against the constable for the conversion of the property wrongfully seized by him, is no bar to an action on his bond against such sureties. *Ib.*

CONSTITUTIONAL LAW.

See WATER RATES, 1.

CONTRACTS, 5, 6.

CONTEMPT.

1. A sum of money had been paid out of a fund in the hands of the receiver under the order of the special term, which order was afterwards set aside and vacated at the general term, and the defendants ordered to pay back the said sum of money to the custody of the clerk of the court; and having failed to comply with that order, they were declared to be in contempt. *Hovey v. McDonald*, 184.
2. As a general rule, where it is sought to bring a party in contempt for disobedience to an order of the court, personal service of the motion should be made upon the party instead of the solicitor or counsel; but if the party flees the jurisdiction, he will not be permitted to prosecute or defend his suit until he purges himself of his contempt. *Ib.*

CORPORATIONS.

1. The Maryland act of November, 1798, chapter 24, for the establishment of vestries for each parish, is in full force as the law of this District, and by its express language the vestrymen of every parish for the time being constitute a corporation. *Commissioners v. Holden*, 579.
2. Promissory notes signed by eight persons styling themselves "Vestrymen of St. James' Parish," which notes were given on the purchase of real estate for the use of a parish regularly organized under the act of 1798, are to be considered the notes of the corporation, and not of the individuals describing themselves as vestrymen. *Ib.*
3. The ancient rule, which required a seal to be affixed to every contract of a corporation, has been dispensed with in modern times, except in regard to deeds and other instruments of a solemn or formal character, and the promissory note of a corporation, signed by the proper officer, is binding upon the corporation and not upon the officer. *Ib.*

COURT OF CLAIMS.

1. Where a claim against the United States was referred by the Secretary of War to the Court of Claims, a judgment rendered thereon upon the merits in favor of the claimants, from which no appeal has been taken, and without a motion for a new trial having been made, is final and conclusive as to all questions which were or which might have been properly considered or decided by the court. *United States v. Moore*, 226.
2. The relator in a *qui-tam* action founded upon sections 3490 and 3491. Revised Statutes, is equally concluded by a judgment in the Court of Claims against the United States. *Ib.*
3. An attorney and counsellor at law who is retained to argue a cause pending in the Court of Claims, is not liable to the action contemplated by the sections of the Revised Statutes above referred to. *Ib.*
4. The Court of Claims is not an officer, "civil or military," within the meaning of section 5438 of the Revised Statutes. *Ib.*

COVENANTS.

See ACTION, 6.

CRIMINAL LAW.

1. Where a prisoner has been convicted on three several informations in the Police Court, and sentenced to be imprisoned three several terms of one hundred and eighty days each without any specification as to the time of beginning or ending of the last two terms of imprisonment, it was held that he could not be imprisoned for a period exceeding that of a single sentence. *In re Jackson*, 24.
2. It is now well settled that in a criminal case there is no error in a judgment making one term of imprisonment commence when another terminates; but this should form part of the judgment. *Ib.*

3. Process after judgment must strictly follow the latter. Mere process, like a warrant of commitment, cannot be resorted to for the purpose of enlarging what the court has solemnly adjudicated. *Ib.*
4. At the trial of an indictment twelve of the regular jurors were impanelled in another cause, and were out consulting upon their verdict. Defendant claimed the right, before the impanelling commenced, to have the whole array present and subject to his challenge. The court ruled against the point, and the jury was completed from the other jurors and talesmen, and the ruling of the court was sustained on appeal. *United States v. Bowen*, 64.
5. On an indictment for presenting a false claim against the United States for back pay of a deceased soldier, claimed by the defendant to be his brother, the allegation of the indictment was that the brother was named "Major Dabney" and enlisted under the name of "George Bowen"; whereas the proof was that defendant claimed to be the brother of George Bowen, who served under the name of Major Dabney. It was held that the variance was immaterial and the defendant properly convicted. *Ib.*
6. Previous good character is not sufficient to create such a doubt in the minds of the jury as would of itself justify an acquittal. *Ib.*
7. Putting a forged deed of real estate on record is, in itself, an act of uttering and publishing. *United States v. Brooks*, 315.
8. It is competent to show that a loan of money was obtained on a deed of trust upon the property in such forged conveyance as evidence of the fraudulent intent with which it was executed. *Ib.*
9. The jury was properly instructed that, while the procuring of money on the security of a deed of trust executed by the grantee in a forged conveyance was not proof of the forgery, still it is to be considered as a circumstance in relation to the utterance of the forged deed, and in relation to the intent with which it was uttered. *Ib.*
10. The intent to defraud the person whose name has been forged may be inferred by the jury when the deed conveys away his property, and the defendant has uttered the forged deed with knowledge of its character. This is the rule, although there was no actual intent to defraud the person from whom a loan was subsequently made upon the strength of the forged title. *Ib.*
11. When the return to a certiorari showed upon the face of the record that there was sufficient to warrant the conviction in the Police Court, the writ will be quashed. It may, however, be used in aid of a *habeas corpus*. *Hoiles v. United States*, 370.
12. Where a larceny consists of a single act, and the goods stolen belong to different persons, it is unnecessary that there should be separate informations or indictments. In such case there can only be one conviction and sentence. *Ib.*
13. An information or indictment charging the stealing of goods of different persons at the same time, in one count, would not be bad for duplicity, provided the ownership of the goods is specifically set

forth. But where there are several counts or separate informations, there can be but one conviction and sentence. *Ib.*

14. A prisoner indicted for assault and battery with intent to kill, may be convicted of the lesser offense. *Ex-parte George Robinson*, 418.

DEED.

See EQUITY, 11, 12, 13.

1. A deed absolute on its face may be shown by parol to be a security for a loan of money. *Hubbard v. Stetson*, 113.
2. A single witness, swearing to an acknowledgment of the defendant that an absolute deed was a security, will not be allowed to overrule the instrument, where the answer and the testimony of the defendants deny the fact of a loan. *Ib.*
3. A deed of conveyance executed by a grantor whose estate has been judicially confiscated under the act of July 17, 1862, (12 Stat., 589,) is of no effect, and conveys no interest or title; and on the death of such grantor the lands go to his heirs at law, subject to his debts created previously to the act under which the estate was confiscated, provided that the personal assets are insufficient. *Wallach v. Van Riewick*, 168.

DEMURRER.

See APPEAL, 2, 3, 4.

DISTRICT OF COLUMBIA.

See ACTION, 2.

BOARD OF PUBLIC WORKS, 1, 2.

CONTRACT, 1, 5, 6.

JUSTICE OF THE PEACE, 4.

PLEADING, 1.

TAXATION, 1, 2.

WATER RATES, 1.

1. The Commissioners of the District of Columbia do not succeed the late Board of Public Works as parties to a bill in equity, where no process has been issued or served upon them; and a rule upon them to show cause in such suit will be discharged. *Tompkins v. Mandel*, 268.
2. The District Commissioners have no authority to deliver to any person certificates turned over to them by the late Board of Audit under the joint resolution of Congress approved March 14, 1877. (Stats. 1876, 1877, 211.) *Ib.*
3. By the provisions of law contained in the Revised Statutes and the act organizing the Police Court, the Commissioners of the District of Columbia are invested with authority to provide a suitable place for holding the sessions of said Police Court, and may enter into a lease of premises to be occupied for that purpose. *Wilson v. District Commissioners*, 473.

4. By act of Congress the Washington Market Company was authorized to erect market buildings on ground belonging to the United States, and to hold the same for a term of ninety-nine years, on an annual rental of \$25,000, which money was directed to be paid to the city of Washington for the support of the poor of said city and of the District of Columbia: *Held*, That this was in the nature of a gratuity or bounty to the city, and remained under legislative control, and subject to be reduced or withdrawn entirely by the power that conferred it. *District of Columbia v. Washington Market Co.*, 559.
5. The reduction of such rent might be by an act of Congress expressly directing it, or Congress might accomplish the same end by authorizing the District of Columbia to release or reduce the rent, and this authority might be confided to the District by general words, though not explicitly describing it. *Ib.*
6. In ascertaining the meaning of an act of Congress, the remarks of members on its passage are too uncertain a source of guidance, and cannot be resorted to by the court for that purpose. *Ib.*
7. A trust created for the benefit of "the poor of the city of Washington and of the District of Columbia," is so vague and indefinite as to be incapable of ascertainment, and is, therefore, totally void. *Ib.*
8. The Metropolitan Police Force is a part of the municipal corporation of the District of Columbia. *Roderick v. District of Columbia*, 589.
9. The Commissioners of said District had authority under the act of Congress of March 3, 1875, to deduct ten dollars per month, which had been allowed by the late corporation of Washington and the Legislative Assembly, from every salary of the members of said force. *Ib.*

DIVORCE.

- A decree of divorce obtained in the Court of Common Pleas of Pennsylvania, by one who does not reside there, is void for want of jurisdiction, and will be so declared here, and fraud may also be set up against a judgment of divorce obtained in another State. *Strait v. Strait*, 415.

DOMICIL.

1. If a child is brought into this District from the State of Tennessee by a person who has not been appointed its guardian, the domicil of the child is not changed, and the legal residence is still that of its parents at the time of their death. *In re Afflick*, 95.
2. The property of an intestate infant should be distributed according to the laws of its domicil at the time of its death. *Ib.*
3. The domicil of a deceased parent continues to be that of a surviving child who was between two and three years old at the time of such death, and the distribution of such infant's estate, who died shortly afterwards, will be according to the laws of such domicil. *Ib.*

EJECTMENT.

1. In an action of ejectment, the declarations of the defendant, made by him at a period after twenty years from the time he claimed to have taken adverse possession, are to be submitted to the jury in respect of the nature of such possession. *Dudley v. Brown*, 280.
2. In an action of ejectment, the plea set forth that plaintiff's title was derived through their mother, still living, who was an alien and was sister to the intestate, and that defendants claim under the heirs of an uncle of the intestate who was capable of taking real estate by inheritance. On demurrer to the plea, it was held that the heirs of the uncle had the better legal right, and that the plaintiff could not derive title by descent from an alien living mother. *Walker v. Potomac Ferry Co.*, 440.

EQUITY.

See TRUSTEE, 2.

1. When a judgment creditor is indebted to the complainant upon certain promissory notes, and the complainant asks that such judgments may be set off against the amount due him upon such notes, it is necessary to allege in the bill of complaint filed for that purpose that such judgment creditor is insolvent, or to aver some other fact or circumstance which prevents the complainant from having an adequate remedy at law for the recovery of the amount due on his notes. *Naudain v. Ormes*, 1.
2. This court has jurisdiction of a bill to foreclose deeds of trust upon real estate given to secure the payment of separate debts, especially when it appears upon the face of the bill that the property has been subdivided, and the parties in interest are numerous and the complication of right is great. *Insurance Co. v. Grant*, 42.
3. Where the principal defendant in such bill sets up in his answer and plea that he has fully paid all claims of the complainant, the issue thus presented is of such a character that it ought to be tried by the court before an order of reference to the auditor to take an account is passed. *Ib.*
4. Where an executor files an inventory, from which it appears that he has paid various debts amounting to nearly all the assets in his hands, and the complainant files his bill to enforce a sale of real estate to pay a debt due him from the estate largely exceeding the balance of assets so inventoried, and the executor interposes a plea averring that he has assets amply sufficient to pay all claims against the estate, and disputes the validity of complainant's debt, but avers his readiness to pay the same when its validity is established in a court of law, the court in equity, if satisfied that the debt is due, will decree the executor to pay the same without a resort to the law side of the court. *Creswell v. Kennedy*, 78.
5. A court of equity will not enjoin a judgment at law, where the remedy is adequate and complete at law; and where a motion to

- open the judgments on the same grounds as those set forth in the bill has been made in the court where the judgments are pending, and which motion is undetermined, there is no ground of relief in equity. *Bohrer v. Fay*, 145.
6. The jurisdiction in chancery to stay proceedings at law upon a judgment is well established, but cautiously exercised. A mere defect of jurisdiction is not sufficient. Equity will interfere only to prevent injustice which has not been brought about by the negligence or inattention of the party aggrieved. *Ib.*
 7. The complainant in the bill must allege and prove that he has a good defense to the action at law, and explain the merits of such defense, and how he has been prevented from availing himself of it. *Ib.*
 8. The defendant obtained judgment against a firm of which complainant was a member, and it has been paid and satisfied. Afterwards, in 1858, he obtained another judgment on a different cause of action against complainant alone, upon which there has been a *scire facias*, and judgment in favor of defendant. The defendant obtained still another judgment against complainant in 1864, which has also been paid and satisfied. The complainant now claims that the payments made on the two judgments that have been satisfied should be credited on the judgment of 1858. The defendant denies this. The complainant's proofs are not satisfactory, and he not having accounted for his delay in asserting his claim, the court, under these circumstances, will not enjoin the proceedings on the *scire facias*. *Rider v. Morsell*, 186.
 9. A payment of the judgment of 1858 would constitute a complete defense for the complainant upon the trial of the *scire facias* at law. But no such defense was set up in the case, and it is therefore impossible that a court of equity should afford him the relief of injunction. *Ib.*
 10. Where parties are exceedingly numerous, and it would be impracticable to join them without very great delay, and would obstruct and defeat the ends of justice, a court of equity will dispense with them, especially when they are members of an unincorporated association, and the officers thereof have been made defendants. *Eller v. Bergling*, 189.
 11. P, during his life-time, obtained several loans of money from B, one of the defendants, and, as security for these loans, assigned an interest in a policy of insurance on his life. Afterwards P, being unable to pay the premiums on the policy, made an absolute assignment of that policy to B, who continued thereafter to pay the premiums until the death of P, and was treated by the agent of the company as the owner of the policy. Under these circumstances, a court of equity will not decree such assignment to be a mere security for the money advanced, as a consideration for the transfer of the policy. *Page v. Burnstine*, 194.
 12. Where the assignor of a policy of life insurance is dead, the assignee

cannot be examined as a witness in regard to the transaction on his own behalf, unless he is called by the other party. *Ib.*

13. Loose memoranda found in the desk of the assignor after his death are incompetent evidence on the part of the administrator of the decedent, in a suit brought by the latter to set aside the assignment as an absolute transfer of the policy. *Ib.*
14. This bill was filed in equity by a creditor, for want of personal assets, to subject the real estate to the satisfaction of his claim; the defendant in the suit was the executor, and he was also the devisee of the real estate sought to be reached. The complainant had obtained a verdict in an action at law against the said executor fixing the amount of his debt, but no judgment was entered on such verdict, for the reason that there were no personal assets in the hands of the executor; and it was held that although the executor and devisee were the same person, he was not concluded by the verdict, nor was it evidence against him, because his capacity as executor was distinct from his capacity as devisee. *Keefe v. Malone, 236.*
15. A verdict in an action at law against an executor or administrator is good only as against personal assets; and if it should appear to the court that there are not assets sufficient to discharge the whole amount, the judgment can be perfected only for such amount as he may have, or if there are other claims entitled to distribution, for a just proportion of the same; and if there should be no personal estate whatsoever, there can be no judgment; and such verdict against the executor cannot be used as evidence in a subsequent suit against said executor in his capacity of devisee. *Ib.*
16. An equity court does not insure the title to real property sold by a trustee under its decree, and the purchaser at such sale assumes all unpaid taxes thereon, unless express provision is made by the court for their payment. *Gunton v. Zantzinger, 262.*
17. It is now settled in our practice that the pleadings, orders, and proceedings in a cause, as well as the final decree, constitute that portion of the record for the purpose of examining all errors of law in a bill of review. *Davis v. Speiden, 283.*
18. An order overruling a demurrer to a bill of complaint, and giving leave to the defendant to answer, is not appealable to the general term; but if, in such case, there is an appeal bond approved by one of the justices, it will operate as a stay of proceedings at the special term; and if any decree affecting the rights of the parties is taken at such special term during the appeal, it will be error in a bill of review. *Ib.*
19. Unless the averments in a bill of complaint are precise and definite, no decree can be taken without proof, although a decree *pro confesso* has been previously obtained; and such error may be assigned in a bill of review. *Ib.*
20. A party must, in general, perform a decree before filing a bill of review. Where the decree is for the payment of money, he must

- either aver performance or set up his inability arising from insolvency. *Ib.*
21. Where there have been two actions in ejectment, one of which has been perpetually enjoined and the other discontinued, and where the defendants set up their title again in a cross-bill, a court of equity will entertain jurisdiction to quiet the title where the adverse possession has ripened into a full and perfect estate. *Harmon v. Dyer*, 292.
 22. A party obtaining a trust deed with notice, either to himself or his agent, of the fraudulent discharge of a prior incumbrance, is not a *bona-fide* purchaser; and a court of equity will set aside such fraudulent release and give the party injured the benefit of his security. *Eldridge v. Insurance Co.*, 301.
 23. It is not competent for a court of equity, at the instance of a subsequent incumbrancer, to divest trustees of the title to property vested in them for a particular purpose, in special confidence and with certain discretionary powers, and to substitute in their place, without their consent, any other person or persons to make a sale of the property or to execute the trust, in the absence of fraud, incompetency, misconduct, irregularity, or other special equity. *Shea v. Dulin*, 339.
 24. A decree was passed for the sale of real estate described in a deed of trust, and that complainant should recover of the defendant any deficiency over and above the proceeds of sale. The decree was upon appeal affirmed by the Supreme Court of the United States, and the case remanded to this court; and the proceeds of sale being insufficient to pay the debt, a personal judgment against the defendant was allowed, in conformity with the original decree.—*Freedman's Savings and Trust Co. v. Dodge*, 529.

EVIDENCE.

See WITNESSES, 1, 2.

MARRIED WOMEN, 1.

PAROL TESTIMONY, 1, 2.

PLEADING, 1.

EXECUTORS AND ADMINISTRATORS, 4.

1. Previous good character is not sufficient to create such a doubt in the minds of the jury as would of itself justify an acquittal. *United States v. Bowers*, 64.
2. Declarations made to a witness by the father of an illegitimate son is not proof of pedigree. *Ib.*
3. Where the plaintiff addressed two letters to the deceased, to which the latter made no reply, the jury are not to infer that the deceased admitted the facts stated in such letters. *Meguire v. Corwine*, 81.
4. Where the assignor of a policy of life insurance is dead, the assignee cannot be examined as a witness in regard to the transaction on his

own behalf, unless he is called by the other party. *Page v. Burnstine*, 194.

5. Loose memoranda found in the desk of the assignor after his death are incompetent evidence on the part of the administrator of the decedent, in a suit brought by the latter to set aside the assignment as an absolute transfer of the policy. *Ib.*
6. In an action of ejectment, the declarations of the defendant, made by him at a period after twenty years from the time he claimed to have taken adverse possession, are to be submitted to the jury in respect of the nature of such possession. *Dudley v. Brown*, 280.

EXECUTORS AND ADMINISTRATORS.

See ORPHANS' COURT, 1, 2

CONTRACT, 2.

EQUITY, 11, 12, 13.

1. Where an executor files an inventory, from which it appears that he has paid various debts amounting to nearly all the assets in his hands, and the complainant files his bill to enforce a sale of real estate to pay a debt due him from the estate largely exceeding the balance of assets so inventoried, and the executor interposes a plea averring that he has assets amply sufficient to pay all claims against the estate, and disputes the validity of complainant's debt, but avers his readiness to pay the same when its validity is established in a court of law, the court in equity, if satisfied that the debt is due, will decree the executor to pay the same without a resort to the law side of the court. *Creswell v. Kennedy*, 78.
2. The paternal grandfather of a deceased infant is nearer of kin by the law of this District than a maternal uncle, and is preferred as administrator, if he apply for the appointment. *In re Affick*, 95.
3. This bill was filed in equity by a creditor, for want of personal assets, to subject the real estate to the satisfaction of his claim; the defendant in the suit was the executor, and he was also the devisee of the real estate sought to be reached. The complainant had obtained a verdict in an action at law against the said executor fixing the amount of his debt, but no judgment was entered on such verdict, for the reason that there were no personal assets in the hands of the executor; and it was held that although the executor and devisee were the same person, he was not concluded by the verdict, nor was it evidence against him, because his capacity as executor was distinct from his capacity as devisee. *Keefe v. Malone*, 236.
4. A verdict in an action at law against an executor or administrator is good only as against personal assets; and if it should appear to the court that there are not assets sufficient to discharge the whole amount, the judgment can be perfected only for such amount as he may have, or if there are other claims entitled to distribution, for a just proportion of the same; and if there should be no personal

estate whatsoever, there can be no judgment; and such verdict against the executor cannot be used as evidence in a subsequent suit against said executor in his capacity of devisee. *Ib.*

EXEMPLARY DAMAGES.

See ASSAULT AND BATTERY, 1, 2, 3.

FORGED ENDORSEMENT.

See POWER OF ATTORNEY, 2.

FRAUD.

See DIVORCE, 1.

1. A court of equity will only sustain a purchase by a trustee from his *cestui que trust* where it is deliberately agreed and understood between them that the relation shall be considered dissolved, and there is a clear contract, ascertained to be such after a zealous and scrupulous examination of the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, and that there is no fraud, concealment, or advantage taken by him. *Beckett v. Tyler*, 319.
2. A party is not considered an innocent purchaser of real estate, as against prior equitable titles, where the record discloses such facts and circumstances as are sufficient to put him on inquiry. *Ib.*
3. Where circumstances of fraud exist on the part of a purchaser of real estate or his assignee with notice thereof, he will not be entitled to compensation for improvements made on such fraudulently acquired property. *Ib.*

FREEDMAN'S SAVINGS AND TRUST COMPANY.

See ACTION.

GARNISHEE PROCESS.

1. The District of Columbia is not liable to be garnished for debts due its contractors, and the Commissioners are exempt from such process on the grounds of public policy. *Manufacturing Co. v. Taylor*, 4.
2. The District of Columbia is not subject to garnishment or attachment, on general principles of public policy, in respect of money due its contractors and officers. *Brown v. District of Columbia*, 77.

HABEAS CORPUS.

See CRIMINAL LAW, 14.

1. Where a prisoner has been convicted on three several informations in the Police Court, and sentenced to be imprisoned three several terms of one hundred and eighty days each without any specification as to the time of beginning or ending of the last two terms of imprisonment, it was held that he could not be imprisoned for a period exceeding that of a single sentence. *In re Jackson*, 24.

2. It is now well settled that in a criminal case there is no error in a judgment making one term of imprisonment commence when another terminates; but this should form part of the judgment. *Ib.*
3. Process after judgment must strictly follow the latter. Mere process, like a warrant of commitment, cannot be resorted to for the purpose of enlarging what the court has solemnly adjudicated. *Ib.*
4. From the final decision of one of the justices of this court at chambers, upon the hearing and determination of a *habeas corpus* discharging the prisoner, an appeal may be taken to the general term at the instance of the Attorney-General of the United States. Section 763 of the Revised Statutes of the United States is applicable to the District of Columbia. *In re George Taylor*, 426.

HUSBAND AND WIFE.

1. A deed of trust executed by husband and wife upon her real estate as security for money advanced to the wife alone, is effectual to pass her title in the property for the purpose of securing the loan in a court of equity. *Kaiser v. Stickney*, 118.
2. A husband conveyed lands to a third party, who conveyed the same to the wife by arrangement, with the usual covenant of warranty. A creditor who advanced money to the wife for the improvement of the property and to pay off prior liens thereon, took a deed of trust upon the property from both husband and wife. It was held that she could enter into the contract; that the deed was binding upon her, and that the court would make a decree of sale of the property to pay the indebtedness. *Ib.*

INDORSER.

See PROMISSORY NOTES, 1.

JUDGMENT.

See COURT OF CLAIMS, 1, 2, 3, 4.

A decree was passed for the sale of real estate described in a deed of trust, and that complainant should recover of the defendant any deficiency over and above the proceeds of sale. The decree was upon appeal affirmed by the Supreme Court of the United States, and the case remanded to this court; and the proceeds of sale being insufficient to pay the debt, a personal judgment against the defendant was allowed, in conformity with the original decree. *Freedman's S. and T. Co. v. Dodge*, 529.

JUDGMENT CREDITOR.

See SET-OFF, 1.

EQUITY, 8, 9.

JURY TRIAL.

1. An instruction to the jury should not assume that the evidence has established facts about which there is controversy and conflict of evidence. *Huber v. Teuber*, 484.
2. When the court is requested to instruct the jury upon a matter in regard to which there is no testimony, the request ought to be rejected. *Wright v. Welch*, 479.

JUSTICE OF THE PEACE.

1. An appeal will not lie from a judgment in a Justice's Court founded upon a verdict of a jury. *Fitzgerald v. Leisman*, 6.
2. This court will compel a justice of the peace, by mandamus, to issue a writ of restitution in execution of a judgment which he has rendered in a landlord and tenant proceeding, where no undertaking has been given by the defendant within the time prescribed by the rules of court in case of appeal. *Kirk v. Cole*, 71.
3. An appeal from a judgment rendered by a justice of the peace will be dismissed where no undertaking was given, as required by rules of court, within ten days after the rendition of the judgment; and the magistrate has no discretion which will authorize him to allow an appeal after the expiration of the prescribed period to which he must conform his practice in all cases of appeal. *Ib.*
4. The Commissioners of the District of Columbia were invested with authority, under the second section of the act of June 20, 1874, to remove a justice of the peace from his office. *Baker v. Dennison*, 430.
5. A justice of the Supreme Court of the District of Columbia cannot legally authorize a writ of certiorari on a judgment rendered by a justice of the peace upon the verdict of a jury in a civil suit before him. *McIntosh v. Johnson*, 586.

LANDLORD'S TACIT LIEN.

1. When chattel trust deeds have been executed by a tenant upon his furniture after the same has been placed upon the leased premises, and a judgment creditor's bill is filed against the tenant, to which the landlord is made a party defendant, and in his answer to such bill the landlord asserts his lien for rent in arrear, and prays judgment of the same out of the funds to be realized from the sale of such furniture, it was decided that such landlord had precedence over the deed of trust, notwithstanding that he had taken no steps prescribed by the statute for enforcing his tacit lien. *Bryan v. Sanderson*, 431.
2. The tacit lien of the landlord exists independently of the methods prescribed by the statute for enforcing it; and if the property subject to such lien come into the possession of a court of equity, or of its officers, it comes into such possession subject to the lien created by the statute in favor of the landlord. *Ib.*

LEGISLATIVE ASSEMBLY.

See MUNICIPAL ORDINANCE, 2.

LIEN.

See TRUSTS, 3.

MECHANIC'S LIEN, 1.

1. The landlord's lien for rent is postponed to a mortgage or deed of trust existing upon the furniture of the tenant before it is moved upon the premises; but where that is displaced, his lien is good against all subsequent incumbrances. *Hechtman v. Sharp*, 90.
2. Where a note secured by a chattel mortgage is destroyed and a new note given in its stead, secured by a new deed upon the property to a different trustee, the lien of the new deed, if it is duly accepted and recorded, takes effect as to third persons from its date only, and these facts operate to let in the landlord's lien for rent in arrears. *Ib.*

LIMITATION OF ACTION.

The statute of limitations refers to the time of the institution of the suit, and not to the time of filing an amendment to the declaration. *Millard v. National Bank*, 54.

MANDAMUS.

See JUSTICE OF THE PEACE, 2, 3.

1. A writ of mandamus will not be issued by this court to compel the Secretary of the Treasury to draw his warrant for the payment of money when the act involves the exercise of judgment or discretion. *United States v. Boutwell*, 172.
2. This court will not compel the Secretary of the Treasury, by a writ of mandamus, to draw his warrant upon the Treasurer for the payment of money unless there has been a specific appropriation for the particular claim, and a direction by Congress for its payment. *Ib.*
3. When the salary of a postmaster has been adjusted and fixed at the proper time, upon a sworn statement of the revenues of the office furnished by such postmaster, a mandamus will not issue to compel a subsequent Postmaster-General to readjust the salary so fixed by his predecessor. *United States v. Key*, 328.
4. The adjustment of such salary is not merely a ministerial function. It requires skill and discretion, which cannot be controlled by the compulsory process of mandamus. *Ib.*
5. This court will not grant a rule on the Postmaster-General to show cause why he should not be compelled to perform an executive act which requires investigation and the exercise of judgment, in a case where it appears from the petition itself that he has acted upon the subject and disposed of the question submitted to his judgment. *United States v. Key*, 337.

MARRIED WOMAN.

See MECHANIC'S LIEN, 1.

1. The testimony of a married woman as to statements made to her by the husband, concerning his pedigree, should be excluded, although he is dead at the time of the trial. *Brooks v. Francis*, 109.
2. A widow whose husband was illegitimate is his sole heir at law, in case there are no children by the marriage. *Ib.*
3. A deed of trust executed by husband and wife upon her real estate as security for money advanced to the wife alone, is effectual to pass her title in the property for the purpose of securing the loan in a court of equity. *Kaiser v. Stickney*, 118.
4. A husband conveyed lands to a third party, who conveyed the same to the wife by arrangement, with the usual covenant of warranty. A creditor who advanced money to the wife for the improvement of the property and to pay off prior liens thereon, took a deed of trust upon the property from both husband and wife. It was held that she could enter into the contract; that the deed was binding upon her, and that the court would make a decree of sale of the property to pay the indebtedness. *Ib.*
5. A married woman who mortgages her separate estate for the debt of her husband acquires the rights and privileges of a surety, and if the principal could claim a right of set-off in a court of equity, the surety is entitled to the same benefit. This principle applied to a case where a husband and wife united in executing a trust deed upon his property, and also upon her separate estate, to secure the promissory note of the husband to a trust company which became insolvent, having in its hands at the time of its failure a cash deposit of the wife; and after the death of the husband it was decided that the claim of the wife might be set off against that of the trust company, and that the latter was entitled only to the difference between the two amounts. *Darby v. Freedman's Savings and Trust Co.*, 349.
6. A married woman cannot be sued when she is a resident in the District of Columbia, under the act of 1869, unless she has a separate estate in said District, in relation to which the contract in suit was made. So held in a case where she gave a joint and several bond for real estate purchased in the city of New York. *Ritch v. Hyatt*, 536.
7. The common-law disability of a married woman to contract has not been removed by that statute, except when her contract has relation to her previously acquired separate estate. This doctrine does not operate to prevent her right to change the investment of her means, by selling property and purchasing other property with the proceeds, that being a right she has always possessed. *Ib.*

MECHANIC'S LIEN.

- A married woman was seized of property against which a claim for a mechanic's lien was filed, entitled against the husband in this form,

"*Thomas C. Basshor & Co. v. Hallet Kilbourn*," and recites that it is the intention of said company "to hold a lien upon the property of Hallet Kilbourn, being his dwelling-house situated at the intersection of K and Seventeenth streets, on lot — in square number 164, for the amount due," &c. : *Held*, That the description of the premises intended to be covered by the lien was not sufficient, and that no lien existed by reason of such notice. *Basshor v. Kilbourn*, 273.

METROPOLITAN POLICE.

See DISTRICT OF COLUMBIA, 8, 9.

MUNICIPAL ORDINANCE.

1. An ordinance of the board of aldermen and common council of the late corporation of Washington, which has not been repealed or modified by act of Congress, or by the Legislative Assembly, is still in full force. (Rev. Stat. Dis. Col., sec. 91.) *Dennison v. Gavin*, 265.
2. The act of the Legislative Assembly of August 23, 1871, for regulating hackney carriages, does not delegate any power to the Board of Public Works to abolish hack-stands established by law; and the District Commissioners are equally incompetent to exercise such authority. *Ib.*

NEGLIGENCE.

In an action for negligence, the defendant is not liable for damages when the plaintiff's fault contributed to the injury. *Dant v. District of Columbia*, 270.

NUISANCE.

See RAILROAD COMPANIES, 13.

ORPHANS' COURT.

1. The justice holding a special term and exercising the powers of the late Orphans' Court in the District of Columbia has authority to refer exceptions to an account of an administratrix for examination to a special auditor, and to determine objections to the report of such auditor, and to settle and adjust the accounts according to the facts of the case. *In re Ames*, 30.
2. The justice holding the Orphans' Court, in settling such account, may disallow credits therein for payments made by the administratrix in her own wrong, and may also direct her to pay over to the administrators *de bonis non* the amount found due from her after such account is so adjusted. Such justice would probably direct a suit at law against her and her bail rather than to enforce collection of the same by proceedings of attachment for contempt. *Ib.*
3. Under the Maryland act of 1798, chapter 61, section 15, not more

than \$300 can be allowed for funeral expenses, although the decedent left a large estate, and directed his executors to bury him decently at their discretion. *In re Butler*, 535.

PAROL CONTRACT.

See STATUTE OF FRAUDS, 1.

PAROL TESTIMONY.

1. A deed absolute on its face may be shown by parol to be a security for a loan of money. *Hubbard v. Stetson*, 113.
2. A single witness, swearing to an acknowledgment of the defendant that an absolute deed was a security, will not be allowed to overrule the instrument, where the answer and the testimony of the defendants deny the fact of a loan. *Ib.*

PARTIES.

Where parties are exceedingly numerous, and it would be impracticable to join them without very great delay, and would obstruct and defeat the ends of justice, a court of equity will dispense with them, especially when they are members of an unincorporated association, and the officers thereof have been made defendants. *Eller v. Bergling*, 189.

PARTNERSHIP.

1. A and B were partners. They agreed with C, who was their salesman, to associate his name with the firm. C was to receive for his services at the rate of four per cent. on the amount of cash and credit sales, but was not to be bound for the debts of the firm. A notice was published in a newspaper of large circulation that C was to have an interest in the establishment. It was held that this was not a declaration of copartnership, and did not make C responsible for the debts of the firm. *Vinson v. Beveridge*, 597.
2. Such publication will not entitle a creditor of the firm to recover against C, unless he knew of it previously to giving credit; and the mere proof of publication in a newspaper is not sufficient to show that the creditor had such knowledge at the time of the transaction. *Ib.*

PATENT LAW.

1. A patent will not be granted by the Commissioner of Patents for an invention which has been previously described in an English patent, nor will it be granted where, from the state of the art, no further description than that contained in the English patent is necessary in order to enable a mechanic to construct and operate the alleged improvement. This is especially the case where the claim is for

a combination, and not for the process by which it is produced. *McCloskey's Application*, 14.

2. When an English patent describes an improvement, and also an alternate mode of effecting the object, it will be a good ground for refusing a patent in this country to another person for either of the modes so described. *Ib.*
3. When a production or combination is claimed, it is not necessary to describe the process by which it is made. That may properly be left to the skill and judgment of persons acquainted with the art. *Ib.*
4. The deflector or jacket located between the outer wick-case and the chimney-holder in the light-house lamp, described in letters-patent No. 184,855, granted to Joseph Funk November 28, 1876, is not found in the Brandywine Shoals burner, upon which it has been rejected, and the public use of such latter lamp is no bar to a claim and patent for said deflector. *Application of Joseph Funk*, 460.

PLEADING.

See EQUITY, 7.

PARTIES, 1.

EJECTMENT, 2.

1. In an action where the declaration is for a personal injury to the plaintiff caused by his falling into an excavation made in a street or highway, it is necessary to prove on the trial that such alleged excavation was within the limits of the street itself. *Young v. District of Columbia*, 137.
2. In declaring upon contracts with the Board of Public Works, it is not necessary to aver that such contracts were in writing, and that a sum of money had been previously appropriated by law for the work embraced in the contracts. These are matters which come more properly by way of defense from the other side. *Bartlett v. District of Columbia*, 258.
3. In a bill by a judgment creditor, it is absolutely necessary to aver that an execution has been issued and duly returned *nulla bona*; and it is not sufficient simply to aver that the defendant has no property subject to execution. *Shea v. Dulin*, 339.

POLICE COURT.

See DISTRICT OF COLUMBIA, 3.

POSTMASTER-GENERAL.

See MANDAMUS, 3, 4, 5.

POWER OF ATTORNEY.

1. A power of attorney to prosecute a claim against the United States, and to receive any check, order, or certificate issued by the govern-

ment for the payment thereof, confers no power upon the attorney to assign or endorse the paper in the name of the payee. *Millard v. National Bank*, 54.

2. When the drawee of such check had settled with the drawer and charged up the amount against him, there is sufficient privity between the parties to enable the payee to recover the amount upon a count for money had and received. This principle is applicable to a case where the bank had paid the check upon a forged endorsement. *Ib.*

PRACTICE.

See DISTRICT OF COLUMBIA, 2.

CERTIORARI, 1, 2.

HABEAS CORPUS, 4.

1. An order overruling or sustaining a demurrer, with leave to amend or answer over, is not appealable. *Parsons v. Parker*, 9.
2. An order sustaining a demurrer to a bill of complaint in equity, or to a declaration at law, does not involve the merits of the case where leave is given to amend such bill or declaration within a specified time. If the plaintiff elects not to amend, and there is judgment against him, he may then appeal to the general term. *Ib.*
3. After final judgment, if an appeal be taken, all orders made in the progress of the suit affecting the merits are subject to review by this court. *Ib.*
4. Where the principal defendant in a bill sets up in his answer and plea that he has fully paid all claims of the complainant, the issue thus presented is of such a character that it ought to be tried by the court before an order of reference to the auditor to take an account is passed. *Insurance Co. v. Grant*, 42.
5. The statute of limitations refers to the time of the institution of the suit, and not to the time of filing an amendment to the declaration. *Millard v. National Bank*, 54.
6. On the argument of an appeal from an order of the special term quashing a writ of certiorari, it is irregular to read an *ex-parte* affidavit of the magistrate before whom the case was tried. If the return is defective, there must be a motion for a further or amended return to the writ. *Market Co. v. Summy*, 59.
7. The United States, when plaintiff in a civil action, is entitled to the writ of attachment, and is relieved by section 1001 of the Revised Statutes from giving the usual undertaking in such cases. *United States v. Ottman*, 73.
8. A resale of property embraced in a trust deed made under order of the court will be confirmed, although the party who holds the notes is the purchaser for a sum less than the amount due, there being no other bidder, provided the sale were fairly and honestly conducted. *Hitz v. Insurance Co.*, 170.
9. A sum of money had been paid out of a fund in the hands of the re-

- ceiver under the order of the special term, which order was afterwards set aside and vacated at the general term, and the defendants ordered to pay back the said sum of money to the custody of the clerk of the court; and having failed to comply with that order, they were declared to be in contempt. *Hovey v. McDonald*, 181.
10. As a general rule, where it is sought to bring a party in contempt for disobedience to an order of the court, personal service of notice of the motion should be made upon the party instead of the solicitor or counsel; but if the party flees the jurisdiction, he will not be permitted to prosecute or defend his suit until he purges himself of his contempt. *Ib.*
 11. The defendant was appointed by a decree of the Circuit Court of Alexandria, Virginia, receiver of a railroad in that State. The plaintiff was injured while a passenger on such road, and brings this action against the receiver for damages; and it was held that the action would not be maintained in this jurisdiction without leave of the court which appointed defendant such receiver. *Barton v. Barbour*, 212.
 12. When a motion is certified to the general term to be heard in the first instance, the same order will be made as, upon the whole case, ought to have been made by the justice holding the special term. *Insurance Co. v. Grant*, 220.
 13. When a receiver is appointed before the coming in of the answer, the defendant will be allowed to move to discharge the receiver after the answer is interposed; and if the bill and answer taken together show that a receiver ought not to have been appointed, the receiver will be discharged. *Ib.*
 14. The defendant consented to the appointment of a receiver upon certain terms, but such terms were not observed in making the appointment, and afterwards the answer came in; upon which and upon affidavit, a motion was made to discharge the receiver, and to restore the property to the possession of the defendant; and it appearing that the receivership was inexpedient and unfit to be longer continued, the court allowed the motion, although no blame was attached to the receiver. *Ib.*
 15. When the defendant moves the court for a new trial at the general term in the first instance, for the reason that the evidence is insufficient or the damages excessive, a case containing all the evidence should be settled and signed by the justice who tried the cause. *Dant v. District of Columbia*, 270.
 16. In a bill by a judgment creditor, it is absolutely necessary to aver that an execution has been issued and duly returned *nulla bona*; and it is not sufficient simply to aver that the defendant has no property subject to execution. *Shea v. Dulin*, 339.
 17. An issue of law produced by a joinder in demurrer cannot be heard at the circuit, unless it is regularly placed upon the calendar. *Knoedler v. Meloy*, 2 MacA., 239, reaffirmed. *Granite Co. v. Blunt*, 365.

18. In an affidavit filed by plaintiff in an action against an endorser of a promissory note, under rule 73, he must set out a statement of the facts necessary to show defendant's liability as endorser; such as that payment had been demanded of the maker, and that notice thereof had been given to defendant. *Bond v. Shepherd*, 367.
19. A motion to quash a writ of certiorari is not a non-enumerated motion within the meaning of section 800 of the Revised Statutes of the District of Columbia, and it may be heard by any of the justices of the court at chambers. Rule 19 is not in violation of that statute. *Maxwell v. Creswell*, 374.
20. A bill of review may be filed under a general rule of court, at any time within two years from the date of the decree sought to be reviewed. *Killian v. Clark*, 379.
21. An appeal does not lie from an order awarding a writ of assistance, or from an order refusing to grant it. *Bryan v. Sanderson*, 402.
22. The undertaking prescribed by general rule 91 need not be filed by the party appealing, unless the appeal is to operate as a stay of proceeding. *Bryan v. Sanderson*, 404.
23. The application for a rehearing is by petition, and not motion. The practice in such case explained; and a rehearing will be denied when the views and facts upon which it is asked were argued, fully considered, and decided at the original hearing. *Boucher v. Boucher*, 453.
24. When the court is requested to instruct the jury upon a matter in regard to which there is no testimony, the request ought to be rejected. *Wright v. Welch*, 479.
25. The second rule of this court—providing that the May term of the Circuit Court shall not extend beyond the third Saturday in July, except to finish a pending trial—considered in a case where the jury had been respited and afterwards reconstructed. *Strong v. District of Columbia*, 499.
26. Where the plaintiff is allowed to amend exceptions to an auditor's report, which amendment introduced new issues, the defendant is entitled to a continuance, in accordance with the fourth section of the act of the Maryland Assembly of 1785, chapter 80, and the court is not at liberty to refuse it. *Ib.*
27. When it is manifest that there has been no real trial of the issues formed by the pleadings, and that such issues were not brought to the attention of the jury, the verdict will be set aside. *Ib.*
28. Practice explained where a cause is referred to an auditor under the Maryland act of 1785, chapter 80, paragraph 1, and how the same is to be tried before a jury on the coming in of the auditor's report. *Ib.*
29. The court will recognize written stipulations entered into by attorneys in regard to the conduct of a cause, and will interfere to prevent their violation by either of the parties; and a continuance should be allowed until the next term when an agreement to that effect has been entered into by the attorneys in the cause. *Ib.*

30. The competency of attorneys to enter into stipulations with one another considered, and the ultimate authority of the court in such matters recognized. *Ib.*
31. A decree was passed for the sale of real estate described in a deed of trust, and that complainant should recover of the defendant any deficiency over and above the proceeds of sale. The decree was upon appeal affirmed by the Supreme Court of the United States, and the case remanded to this court; and the proceeds of sale being insufficient to pay the debt, a personal judgment against the defendant was allowed, in conformity with the original decree. *Freedman's Savings and Trust Co. v. Dodge*, 529.
32. Parties defendants who have filed answers to a bill in equity are not entitled to have the bill dismissed for want of prosecution, unless they have given ten days' notice, as prescribed by rule 61, to complainants' solicitor of the filing of such answer; and if defendant neglect to give such notice, either party may set the cause down for hearing upon bill and answer without notice. *McIntosh v. Moulton*, 587.

PROMISSORY NOTES.

See TRUSTS, 1.

1. Where an endorser had a residence in Washington previous to the making of the notes, and then moved to New York, but left his daughter, who was a member of his family, in possession of such tenement in Washington, together with his servants, and maintained that branch of his family there, stopping there from time to time when he came to Washington on business, it was held that notice of protest served at such house was sufficient. *Murray v. Ormes*, 60.
2. The contract obligation of parties to negotiable paper is, that a person makes a note because he owes the money to the payee and endorser, and no one is under any obligation to deal with it under any other presumption. *Tyler v. Busey*, 344.
3. Where a note is made for the accommodation of the payee, and the latter puts up his own property as collateral security for its payment upon obtaining a discount thereof, such collateral may be changed to secure other liabilities, where the holder had no notice that the maker made it for such accommodation, and had no notice of any agreement between the original parties that the payee was to secure its payment. *Ib.*
4. The Maryland act of November, 1798, chapter 24, for the establishment of vestries for each parish, is in full force as the law of this District, and by its express language the vestrymen of every parish for the time being constitute a corporation, and promissory notes signed by eight persons styling themselves "Vestrymen of St. James' Parish," which notes were given on the purchase of real estate for the use of a parish regularly organized under the act of 1798, are to be considered the notes of the corporation, and not of the individ-

uals describing themselves as vestrymen. *Commissioners v. Holden*, 579.

5. The ancient rule, which required a seal to be affixed to every contract of a corporation, has been dispensed with in modern times, except in regard to deeds and other instruments of a solemn or formal character, and the promissory note of a corporation, signed by the proper officer, is binding upon the corporation and not upon the officer. *Ib.*

PROTEST.

See PROMISSORY NOTES, 1.

RAILROAD COMPANIES.

The complainant was authorized by act of Congress to cross or intersect with their tracks any established road or street in this District. The District authorities gave a contract to the defendants Gallaher & Co. to construct a sewer which would necessarily pass in its course under the tracks of said railroad where they crossed one of the public streets in Washington. The contractors were near complainant's tracks with their excavation, which it was alleged would endanger the tracks, and prevent their use, unless great care and expense were employed in their protection. There are no averments in the bill that the contractors were doing anything which they were not authorized by law to do, or that they were doing the work in such a careless manner as to interfere with the rights of said railroad company: *Held*—

1. That while the company, under such acts of Congress, had a right to lay down the tracks of its road at the intersection of the street in question, it was subject to the right of the District to construct a sewer under said street if deemed necessary to the comfort and health of the public. *Railroad Co. v. Dennison*, 245.
2. That the obligation of the contractors, as respects complainant, was to do the work in such manner as not to interfere with the rights of the company. *Ib.*
3. That the company had a right to run their cars over the tracks of the road at the crossing of the street, and the District had a right to construct a sewer under said tracks; and in the exercise of these respective rights, neither of the parties must do the other any unnecessary damage. *Id.*
4. That the railroad company, not being a party to the contract for the construction of the sewer, could not invoke the aid of this court to enforce its provisions, especially when the contractors were performing the contract with due care. *Ib.*
5. That the special term had no jurisdiction to pass an order requiring the contractors to construct the sewer, where it passes under the tracks of the railroad, under the supervision and direction of the engineer of the company. *Ib.*

6. That order having been complied with, however, by the contractors, and the final decree making no provision to reimburse them for the extra expense thereby incurred, such final decree is set aside, and an order made appointing a competent engineer to report upon the necessary costs of constructing said sewer in a suitable manner, such cost to be charged to the contractors, and any amount expended above that sum to be paid by the railroad company. *Ib.*
7. The Baltimore and Potomac Railroad was authorized by act of Congress May 21, 1872, to lay its track along Sixth street, paying any damage sustained by the owners of property. If the company could not agree with the owner, it was required to cause the damages to be assessed by a jury. This the company neglected to do, and the court decides that the owner can maintain an action on the case for such neglect of the company, and that the plaintiff can recover in such action all the damages resulting to his property. *Dickson v. B. and P. R. R. Co.*, 362.
8. In an action for damages to real estate caused by a railroad company in using a public avenue for loading and unloading freight, witnesses who are acquainted with the value of property in the same locality may testify as to their opinion of the depreciation of said property, due to the use of said avenue for the purpose of a freight delivery. *Trook v. B. and P. R. R. Co.*, 392.
9. The plaintiff in such action is entitled to damage where the railroad company uses the avenue for the purpose of a freight yard or freight delivery, and where the avenue is thereby obstructed and the value of plaintiff's property diminished. *Ib.*
10. In such action the plaintiff is not confined to structural damage to the building, or physical injury and harm to the land. He may also recover any other damage growing out of the unreasonable and unlawful use of the avenue. *Ib.*
11. Certain acts of Congress authorized the Baltimore and Potomac Railroad Company to extend its line of railroad into the District of Columbia, and along K street in the city of Washington, upon the established grade of said street. The plaintiff was a lot-owner on K street, and sued the company for damage caused to his property by the neglect of the company to provide proper means to carry off the water, which formed into pools and deep holes in front of and near said property in consequence of the embankment of the road. That said embankment also rendered the plaintiff's lots inaccessible and useless as places of business or residence: *Held*, That as the road was built in conformity to a grade which had been prescribed by acts of Congress, it was therefore a lawful road, and the damages resulting therefrom must be borne by the lot-owners. *Nottingham v. B. and P. Railroad*, 517.
12. Had such road been constructed without law, or had it not been constructed in the manner prescribed by law, and special injury

had been sustained by the plaintiff, this would have been a good ground for damages. *Ib.*

13. Where an injury is the result of a common nuisance, it is not a ground of action for damages unless the plaintiff can prove some injury to himself, of a character different in kind from that common injury which he may have sustained with the rest of the public by reason of such nuisance. And this special injury must be something not merely differing in degree, but in kind, from that which is common to all. This doctrine applied in a case where it is alleged that railroad crossings at the junction of streets in a city were neither safe nor convenient for the passage and transportation of persons and property across and along the same. *Ib.*

RECEIVER.

See ACTION, 4.

1. When a mortgage or deed of trust does not in express terms create a lien upon the rents and profits of the mortgaged property, a receiver thereof ought not to be appointed for the benefit of those interested, simply upon an averment in the bill that the mortgaged estate is an inadequate security, and that the grantor is insolvent. *Insurance Co. v. Grant*, 220.
2. When a receiver is appointed before the coming in of the answer, the defendant will be allowed to move to discharge the receiver after the answer is interposed. And if the bill and answer taken together show that a receiver ought not to have been appointed, the receiver will be discharged. *Ib.*
3. The defendant consented to the appointment of a receiver upon certain terms, but such terms were not observed in making the appointment, and afterwards the answer came in; upon which and upon affidavit, a motion was made to discharge the receiver and to restore the property to the possession of the defendant; and it appearing that the receivership was inexpedient and unfit to be longer continued, the court allowed the motion, although no blame was attached to the receiver. *Ib.*

SALE.

A resale of property embraced in a trust deed made under order of the court will be confirmed, although the party who holds the notes is the purchaser for a sum less than the amount due, there being no other bidder, provided the sale were fairly and honestly conducted. *Hitz v. Insurance Co.*, 170.

SECRETARY OF THE TREASURY.

See MANDAMUS, 1, 2.

SET-OFF.

1. When a judgment creditor is indebted to the complainant upon certain promissory notes, and the complainant asks that such judgments

may be set off against the amount due him upon such notes, it is necessary to allege in the bill of complaint filed for that purpose that such judgment creditor is insolvent, or to aver some other fact or circumstance which prevents the complainant from having an adequate remedy at law for the recovery of the amount due on his notes. *Naudain v. Ormes*, 1.

2. A party sued by the United States cannot set up a claim by way of set-off, unless such claim has been made out with the proper account and vouchers, and presented for settlement at the Treasury Department as required by section 951 of the Revised Statutes; and where the claim is sustained by no evidence except the affidavit of the claimant, it was properly rejected by the accounting officers of the government, and is equally inadmissible as evidence on the trial of the case in court. *United States v. Lamon*, 204.
3. A married woman who mortgages her separate estate for the debt of her husband acquires the rights and privileges of a surety, and if the principal could claim a right of set-off in a court of equity, the surety is entitled to the same benefit. This principle applied to a case where a husband and wife united in executing a trust deed upon his property, and also upon her separate estate, to secure the promissory note of the husband to a trust company which became insolvent, having in its hands at the time of its failure a cash deposit of the wife; and after the death of the husband it was decided that the claim of the wife might be set off against that of the trust company, and that the latter was entitled only to the difference between the two amounts. *Darby v. Freedman's S. and T. Co.*, 349.

STATUTE OF FRAUDS.

Where a parol contract for the exchange of lands is clearly established by the evidence, and has been fully performed by the complainant, a court of equity will compel the defendant to execute the part of such contract which still remains executory. *Armes v. Bigelow*, 442.

STATUTES CONSTRUED.

1. Words in a statute are to be taken in their ordinary signification, and the courts will presume that they were used to express their meaning in common usage. *In re Capital Publishing Co.*, 405.
2. In ascertaining the meaning of an act of Congress, the remarks of members on its passage are too uncertain a source of guidance, and cannot be resorted to by the court for that purpose. *District of Columbia v. Washington Market Co.*, 559.
3. A trust created for the benefit of "the poor of the city of Washington and of the District of Columbia," is so vague and indefinite as to be incapable of ascertainment, and is, therefore, totally void. *Ib.*

SURETIES.

See CONSTABLE, 1, 2.

TAXATION.

The act of the Legislature of Maryland incorporating the Baltimore and Ohio Railroad Company provided that the shares of the company were to be deemed and considered personal estate, and to be exempt from the imposition of any tax or burden by the States assenting to the law. This law was amended February 23, 1831, so as to enable the company to construct a branch road to the line of the District of Columbia, and the amendment contained a proviso that it should not be construed to preclude the Legislature from the imposition of such taxes as might be reasonable and just, in accordance with the burden imposed on other real and personal property.

By an act of Congress, March 2, 1831, the company was authorized to extend this branch road to the city of Washington, subject to the same rights and immunities as those in the charter: *Held*—

1. That the act of Congress had reference to the original charter of the company as amended, and that its property lying and being in the District of Columbia is subject to taxation the same as the property of individuals. *Railroad Co. v. District of Columbia*, 122.
2. That an act of Legislature under which a railroad company claims that its property is exempt from taxation is to be strictly construed, and if there is any doubt about its meaning the claim will not be sustained. *Ib.*
3. That the liability for unpaid taxes reaches back for a period of twenty years from the institution of the suit. *Ib.*

TAXES.

See TRUSTEE, 1.

CONTRACT, 5, 6.

1. The collector of taxes in the District of Columbia was applied to for a statement of unpaid taxes upon certain real estate by one who did not disclose the object of the inquiry, or that he was about to become a purchaser; and it was held that the District was not estopped from making sale of said property for unpaid taxes thereon, which had been omitted by mistake from the statement furnished on such request, although the applicant relied upon the collector's statement in afterwards purchasing the property. *Elliot v. District of Columbia*, 396.
2. The duties of the collector are prescribed by statute, and he is not required to make search and furnish statements of unpaid taxes. His statements and his mistakes in regard to unpaid taxes can never, therefore, operate as an estoppel upon the District of Columbia. *Ib.*

TRUSTS.

See LIEN, 1, 2.

MARRIED WOMAN, 3, 4.

1. When a trust deed is given to secure a debt for which seven promissory notes are passed, payable at various periods, and in case of

default sale is to be made and the notes paid whether due or not, and the fund realized from the sale is insufficient to pay all the notes in full, the holders thereof are entitled to a *pro rata* distribution, without regard to the order in which the notes mature, upon their face. *National Bank v. Brown*, 75.

2. A resale of property embraced in a trust deed made under order of the court will be confirmed, although the party who holds the notes is the purchaser for a sum less than the amount due, there being no other bidder, provided the sale were fairly and honestly conducted. *Hitz v. Insurance Co.*, 170.
3. When a mortgage or deed of trust does not in express terms create a lien upon the rents and profits of the mortgaged property, a receiver thereof ought not to be appointed for the benefit of those interested, simply upon an averment in the bill that the mortgaged estate is an inadequate security, and that the grantor is insolvent. *Insurance Co. v. Grant*, 220.
4. A trustee cannot, by his arbitrary act, divest the *cestui que trust* of legal or equitable rights, where the case presents badges of fraud or unfair dealing. *Eldridge v. Insurance Co.*, 301.
5. Where an insurance company in another State employs an agent here to invest moneys on real-estate securities, it was held that such company was chargeable with any notice or knowledge acquired by such agent in regard to existing equities on the property; and this rule was applied where the same person was the common agent of the borrower and lender. *Ib.*
6. A party obtaining a trust deed with notice, either to himself or his agent, of the fraudulent discharge of a prior incumbrance, is not a *bona-fide* purchaser; and a court of equity will set aside such fraudulent release and give the party injured the benefit of his security. *Ib.*
7. Where a purchaser employs the trustee in a prior trust deed to examine the title, such trustee, in respect of that matter, is the agent of the purchaser, and notice acquired by him, in the course of such employment, is notice to the purchaser. *Ib.*

TRUSTEE.

See TRUSTS, 4, 5, 6, 7.

1. An equity court does not insure the title to real property sold by a trustee under its decree, and the purchaser at such sale assumes all unpaid taxes thereon, unless express provision is made by the court for their payment. *Gunton v. Zantzinger*, 262.
2. A court of equity will only sustain a purchase by a trustee from his *cestui que trust* where it is deliberately agreed and understood between them that the relation shall be considered dissolved, and there is a clear contract, ascertained to be such after a zealous and scrupulous examination of the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, and that there

is no fraud, concealment, or advantage taken by him. *Beckett v. Tyler*, 319.

3. It is not competent for a court of equity, at the instance of a subsequent incumbrancer, to divest trustees of the title to property vested in them for a particular purpose, in special confidence and with certain discretionary powers, and to substitute in their place, without their consent, any other person or persons to make a sale of the property or to execute the trust, in the absence of fraud, incompetency, misconduct, irregularity, or other special equity. *Shea v. Dulin*, 339.

VERDICT.

See EXECUTORS AND ADMINISTRATORS, 3, 4.

VOLUNTARY CONVEYANCE.

1. Where a person conveys real estate in trust for the use of his wife, at a time when he is engaged in a prosperous business and is perfectly solvent, the law will not presume that he intended to hinder and delay a creditor whose debt was created several years after the conveyances were made. Fraud in such case is to be established by proof, and not by presumption. *Killian v. Clark*, 379.
2. If, however, a voluntary settlement is made at or about the time the debt is contracted, a court of equity will set it aside at the instance of the creditors. *Ib.*

WATER RATES.

- A lot-owner in Georgetown who uses the water from the Potomac aqueduct, is not exempt from water rates for the purpose of defraying the current expenses incident to the use of such water. The United States have never entered into any contract by which the citizens of that city who use water from such aqueduct are to be forever exempt from water rates or charges, and the act of July 12, 1876, is not unconstitutional as impairing the obligation of any such contract. *Welch v. District of Columbia*, 463.

WILL.

1. When a codicil to a will of real and personal estate was found among the papers of the deceased, which he had signed, bequeathing legacies, and there was an attestation clause in his own handwriting which was not subscribed by any attesting witnesses, the presumption of law in such case is that the testator intended to acknowledge and publish it in the presence of witnesses, and that it is, therefore, incomplete and invalid as a testamentary paper. *Power v. Davis*, 153.
2. The will contained a general direction for paying debts, but they were not in terms made a charge upon real estate. The children

were each to take an equal share in the estate. The codicil bequeathed money legacies to the complainants, but created no fund for their payment: *Held*, That the real estate devised is not liable to contribute to make up any deficiency in the personal property for the payment of legacies. *Ib.*

3. The will gave a better title to the devisees than they would acquire by descent. They therefore take by purchase, and not by descent. *Ib.*

WITNESSES.

1. In an action upon a parol contract against executors, the plaintiff cannot be examined as a witness on his own behalf to prove such contract, or to testify to conversations with the deceased, unless called by the opposite party or by the court to be examined. (U. S. Rev. Stats., sec. 858.) *Mequire v. Corvine*, 81.
2. The testimony of a married woman as to statements made to her by the husband, concerning his pedigree, should be excluded, although he is dead at the time of the trial. *Brooks v. Francis*, 109.
3. Where the assignor of a policy of life insurance is dead, the assignee cannot be examined as a witness in regard to the transaction on his own behalf, unless he is called by the other party. *Page v. Burnstine*, 194.
4. Loose memoranda found in the desk of the assignor after his death are incompetent evidence on the part of the administrator of the decedent, in a suit brought by the latter to set aside the assignment as an absolute transfer of the policy. *Ib.*
5. A witness who swears to a falsehood in relation to a matter the truth of which he must have known, is not to be believed in any part of his testimony, even when the fact is not material in the case. *Huber v. Teuber*, 484.

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